Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 16-605

IN THE
Supreme Court of the United States

TOWN OF CHESTER,
Petitioner,

v.

LAROE ESTATES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: NOVEMBER 3, 2016
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 1:12-cv-00647-ER

STEVEN M. SHERMAN,

Plaintiff,

v.

TOWN OF CHESTER, ET AL.,

Defendants.

RELEVANT DOCKET ENTRIES

Date	#	Docket Text
01/26/2012	1	NOTICE OF REMOVAL from Supreme Court, County of Orange. Case Number: 2012/000177. (Filing Fee $ 350.00, Receipt Number 465407002457).Document filed by Town of Chester, Planning Board of the Town of Chester, Town Board of the Town of Chester.(rj) (Additional attachment(s) added on 2/7/2012: # 1 Notice of Removql) (fk). (Entered: 01/31/2012)
		* * *
05/07/2012	6	MOTION to Dismiss *Plaintiff's Complaint.* Document filed by Planning Board of the Town of

Date	#	Docket Text
		Chester, Town Board of the Town of Chester, Town of Chester. (Stern, Steven) (Entered: 05/07/2012)
05/07/2012	7	DECLARATION of Steven C. Stern in Support re: 6 MOTION to Dismiss *Plaintiff's Complaint.*. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Exhibit A - part 1, # 2 Exhibit A - part 2, # 3 Exhibit B-L, # 4 Exhibit M-N, # 5 Exhibit O, # 6 Exhibit P-DD)(Stern, Steven) (Entered: 05/07/2012)
05/07/2012	8	MEMORANDUM OF LAW in Support re: 6 MOTION to Dismiss *Plaintiff's Complaint.*. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Appendix 1) (Stern, Steven) (Entered: 05/07/2012)
07/06/2012	9	MEMORANDUM OF LAW in Opposition re: 6 MOTION to Dismiss *Plaintiff's Complaint.*. Document filed by Steven M. Sherman. (Diederich, Michael)

Date	#	Docket Text
		(Entered: 07/06/2012)
		* * *
08/10/2012	11	REPLY MEMORANDUM OF LAW in Support re: 6 MOTION to Dismiss *Plaintiff's Complaint.*. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Appendix)(Stern, Steven) (Entered: 08/10/2012)
		* * *
03/20/2013	14	OPINION AND ORDER re: 6 MOTION to Dismiss *Plaintiff's Complaint* filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. For the reasons stated above, Defendants' motion to dismiss is GRANTED in part as to all of Plaintiffs federal claims. The case is REMANDED to the Supreme Court of the State of New York, Orange County. The Clerk of the Court is respectfully requested to terminate the motion, Doc. 6. SO ORDERED. (Signed by Judge Edgardo Ramos on 3/20/2013) (mml)

Date	#	Docket Text
		(Entered: 03/20/2013)
03/20/2013		CASE REMANDED OUT from the U.S.D.C. Southern District of New York to the State Court - Supreme Court of the State of New York, County of Orange. Sent certified copy of docket entries and remand order. Mailed via Federal Express AIRBILL # 8769 0956 6760 on 3/20/2013. (mml) (Entered: 03/20/2013)
04/18/2013	15	NOTICE OF APPEAL from 14 Memorandum & Opinion,,. Document filed by Steven M. Sherman. Filing fee $ 455.00, receipt number 0208-8429973. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Diederich, Michael) (Entered: 04/18/2013)
		* * *
05/28/2014	16	ENDORSED LETTER addressed to Judge Edgardo Ramos from Joseph J. Haspel, dated 5/28/2014. re: Please be advised that I represent Laroe Estates, Inc., which is seeking to move to intervene as a party plaintiff pursuant to FRCP 24.

Date	#	Docket Text
		ENDORSEMENT: The application is granted. A pre-motion conference will be held on June 20, 2014 at 10:15 a.m. Plaintiff and defendant are directed to submit a written response not longer than 3 pages by June 13, 2014. (Pre-Motion Conference set for 6/20/2014 at 10:15 AM before Judge Edgardo Ramos.) (Signed by Judge Edgardo Ramos on 5/28/2014) (ja) (Entered: 05/28/2014)
05/30/2014	17	ENDORSED LETTER addressed to Judge Edgardo Ramos from Steven C. Stern, dated 5/29/2014, re: Pursuant to Your Honor's individual practice rules, we request a pre-motion conference in anticipation of moving to dismiss the claims the Second Circuit's recent decision did not touch. The Court scheduled a June 20, 2014 pre-motion conference on proposed intervenor Laroe Estate's motion for intervention. ENDORSEMENT: The court will hear your request at the June 20, 2014 Pre-Motion Conference. Plaintiff is directed to submit a written response not longer than 3 pages by June 13, 2014, by the close of business.

Date	#	Docket Text
		SO ORDERED. (Signed by Judge Edgardo Ramos on 5/30/2014) (ja) (Entered: 05/30/2014)
		* * *
06/20/2014		Minute Entry for proceedings held before Judge Edgardo Ramos: Pre-Motion Conference held on 6/20/2014. Plaintiff's counsel, Michael Diederich, present, Defendants' counsel, Anthony Cardoso, present, and Proposed Intervenor's counsel, Joseph Haspel, present. Defendants are granted leave to file a motion to dismiss, and Proposed Intervenor is granted leave to file a motion to intervene, with the following briefing schedule: moving papers due August 1, 2014; opposition papers due September 15, 2014; reply papers due September 29, 2014. Proposed Intervenor is granted leave to file a motion for leave to appear as amicus curiae should it separately wish to file a brief with respect to Defendants' motion to dismiss. Defendants' opening brief with respect to their motion to dismiss, along with Plaintiff's opposition brief

Date	#	Docket Text
		thereto, may be up to 50 pages in length. (Motions due by 8/1/2014. Replies due by 9/29/2014. Responses due by 9/15/2014). (Court Reporter Samuel Mauro) (jar) (Entered: 06/21/2014)
		* * *
08/01/2014	21	MOTION to Dismiss . Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester.(Cardoso, Anthony) (Entered: 08/01/2014)
08/01/2014	22	DECLARATION of Anthony F. Cardoso in Support re: 21 MOTION to Dismiss .. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Exhibit Exhibit 1 of 5, # 2 Exhibit Exhibit 2 of 5, # 3 Exhibit Exhibits 3 of 5, # 4 Exhibit Exhibit 4 of 5, # 5 Exhibit Exhibit 5 of 5)(Cardoso, Anthony) (Entered: 08/01/2014)
08/01/2014	23	MEMORANDUM OF LAW in Support re: 21 MOTION to Dismiss .. Document filed by Planning Board of the Town of

Date	#	Docket Text
		Chester, Town Board of the Town of Chester, Town of Chester. (Attachments: # 1 Appendix)(Cardoso, Anthony) (Entered: 08/01/2014)
08/04/2014	24	MOTION to Intervene . Document filed by Laroe Estates Inc..(Haspel, Joseph) (Entered: 08/04/2014)
08/04/2014	25	AFFIRMATION of Joseph J. Haspel in Support re: 24 MOTION to Intervene.. Document filed by Laroe Estates Inc.. (Attachments: # 1 Exhibit proposed complaint, # 2 Exhibit sherman complaint, # 3 Exhibit Ct of Appeals Decision, # 4 Exhibit Contract, # 5 Exhibit Settlement Agreement, # 6 Exhibit Arbitration Ruling, # 7 Exhibit Consulting Agmt, # 8 Exhibit Referee Report of Sale) (Haspel, Joseph) (Entered: 08/04/2014)
08/04/2014	26	MEMORANDUM OF LAW in Support re: 24 MOTION to Intervene .. Document filed by Laroe Estates Inc.. (Haspel, Joseph) (Entered: 08/04/2014)
09/10/2014	27	MANDATE of USCA (Certified Copy) as to 15 Notice of Appeal

Date	#	Docket Text
		filed by Steven M. Sherman. USCA Case Number 13-1503. Ordered, Adjudged and Decreed that the order of the District Court is AFFIRMED in part, VACATED in part and REMANDED in accordance with the opinion of this court. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 09/10/2014. (Attachments: # 1 Opinion)(nd) (Entered: 09/10/2014)
		* * *
09/12/2014	29	MOTION to File Amicus Brief. Document filed by Laroe Estates Inc..(Haspel, Joseph) (Entered: 09/12/2014)
09/12/2014	30	AFFIRMATION of Joseph J,. Haspel in Support re: 29 MOTION to File Amicus Brief.. Document filed by Laroe Estates Inc.. (Attachments: # 1 Exhibit Ex A - MOL)(Haspel, Joseph) (Entered: 09/12/2014)
09/15/2014	31	MEMORANDUM OF LAW in Opposition re: 24 MOTION to Intervene .. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Ches-

Date	#	Docket Text
		ter. (Cardoso, Anthony) (Entered: 09/15/2014)
09/15/2014	32	DECLARATION of Michael Diederich Esq in Opposition re: 21 MOTION to Dismiss .. Document filed by Steven M. Sherman. (Attachments: # 1 Exhibit Pl. Exhibits 1-4, # 2 Exhibit Pl. Exhibit 5)(Diederich, Michael) (Entered: 09/15/2014)
09/15/2014	33	MEMORANDUM OF LAW in Opposition re: 21 MOTION to Dismiss . . Document filed by Steven M. Sherman. (Diederich, Michael) (Entered: 09/15/2014)
		* * *
10/02/2014	36	ORDER denying 29 Motion to File Amicus Brief. Accordingly, Proposed Intervenor's motion for leave to participate as amicus curie is DENIED. The Clerk of the Court is respectfully directed to terminate the motion (Doc. 29). SO ORDERED.(Signed by Judge Edgardo Ramos on 10/02/2014) (ama) (Entered: 10/02/2014)
10/13/2014	37	REPLY MEMORANDUM OF LAW in Support re: 21 MOTION to Dismiss . . Document filed by

Date	#	Docket Text
		Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Cardoso, Anthony) (Entered: 10/13/2014)
10/13/2014	38	REPLY MEMORANDUM OF LAW in Support re: 24 MOTION to Intervene.. Document filed by Laroe Estates Inc.. (Attachments: # 1 Exhibit R&V Brief, # 2 Exhibit Gebman Brief)(Haspel, Joseph) (Entered: 10/13/2014)
03/31/2015	39	OPINION AND ORDER #105408 re: 24 MOTION to Intervene . filed by Laroe Estates Inc., 21 MOTION to Dismiss . filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. For the reasons stated above, Defendants' motion to dismiss is GRANTED in part and DENIED in part. Laroe's motion to intervene is DENIED. The Clerk of the Court is respectfully requested to terminate the motions, Doc. 21 and Doc. 24. The parties are directed to appear for a status conference on Wednesday, April 23, 2015 at 10:30. It is SO

Date	#	Docket Text
		ORDERED. (See Order.) (Signed by Judge Edgardo Ramos on 3/31/2015) (ajs) Modified on 4/1/2015 (soh). (Entered: 04/01/2015)
		* * *
04/08/2015	40	NOTICE OF INTERLOCUTORY APPEAL from 39 Memorandum & Opinion,,. Document filed by Laroe Estates Inc.. Filing fee $ 505.00, receipt number 0208-10791805. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Haspel, Joseph) (Entered: 04/08/2015)
		* * *
04/20/2015	45	MOTION for Reconsideration re; 39 Memorandum & Opinion,, *Notice of Motion.* Document filed by Steven M. Sherman.(Diederich, Michael) (Entered: 04/20/2015)
04/20/2015	46	MEMORANDUM OF LAW in Support re: 45 MOTION for Reconsideration re; 39 Memorandum & Opinion,, *Notice of Motion. P's Memorandum of Law with Attachments 1 & 2.*

Date	#	Docket Text
		Document filed by Steven M. Sherman. (Attachments: # 1 Attachment 1, # 2 Attachment 2)(Diederich, Michael) (Entered: 04/20/2015)
		* * *
05/05/2015	47	MEMORANDUM OF LAW in Opposition re: 45 MOTION for Reconsideration re; 39 Memorandum & Opinion,, *Notice of Motion.* . Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Cardoso, Anthony) (Entered: 05/05/2015)
		* * *
05/19/2015	51	REPLY MEMORANDUM OF LAW in Support re: 45 MOTION for Reconsideration re; 39 Memorandum & Opinion,, *Notice of Motion. P's Reply Brief (amended) w attachment.* Document filed by Steven M. Sherman. (Attachments: # 1 Exhibit Letter)(Diederich, Michael) (Entered: 05/19/2015)
		* * *
07/27/2016	54	MANDATE of USCA (Certified Copy) as to 40 Notice of Inter-

Date	#	Docket Text
		locutory Appeal, filed by Laroe Estates Inc. USCA Case Number 15-1086. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's order of March 31, 2015 is VACATED insofar as it denied Laroe's motion to intervene, and the case is REMANDED for further proceedings consistent with the opinion of this Court. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 07/27/2016. (Attachments: # 1 Opinion)(nd) (Entered: 07/27/2016)
		* * *
08/05/2016	57	COMPLAINT against Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester. (Filing Fee $ 400.00, Receipt Number 0208-12618489)Document filed by Laroe Estates Inc..(Haspel, Joseph) (Entered: 08/05/2016)
		* * *
09/30/2016	62	ORDER denying 45 Motion for Reconsideration re 39 Memorandum &Opinion. Plaintiff

Date	#	Docket Text
		Nancy Sherman moves pursuant to Local Rule 6.3 for reconsideration of this Court's Order dated March 31, 2015 (Doc. 39). The motion is DENIED. An opinion will follow. The parties are directed to appear for a status conference on Thursday, October 6, 2016, at 2:30. The Clerk is respectfully directed to terminate the motion, Doc. 45. It is SO ORDERED. (Signed by Judge Edgardo Ramos on 9/30/2016) (kko) (Entered: 09/30/2016)
		* * *
10/06/2016	63	MEDIATION REFERRAL ORDER: IT IS ORDERED that this case is referred for mediation to the Court's Mediation Program. Local Rule 83.9 and the Mediation Program Procedures shall govern the mediation. The Court requests a mediator who has experience with constitutional issues pertaining to land use and zoning, as well as a background in commercial law. Please reference the following when corresponding with the Mediation Office. E-mail MediationOf-

Date	#	Docket Text
		fice@nysd.uscourts.gov, telephone (212) 805-0643, and facsimile (212) 805-0647. Mediator to be Assigned by 10/17/2016. Mediator Expertise Request due by 10/11/2016. (Signed by Judge Edgardo Ramos on 10/6/2016) (cf) (Entered: 10/06/2016)
		* * *
11/23/2016	64	ANSWER to Complaint. Document filed by Planning Board of the Town of Chester, Town Board of the Town of Chester, Town of Chester.(Stern, Steven) (Entered: 11/23/2016)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 15-1086

LAROE ESTATES, INC.,

Movant-Appellant,

v.

TOWN OF CHESTER,

Defendant-Appellee.

RELEVANT DOCKET ENTRIES

Date	#	Docket Text
04/08/2015	1	NOTICE OF INTERLOCUTORY CIVIL APPEAL, with district court docket, on behalf of Appellant Laroe Estates, Inc., FILED. [1480875][15-1086][Entered: 04/09/201511:49AM]
		* * *
07/13/2015	36	BRIEF & SPECIAL APPENDIX, on behalf of Appellant Laroe Estates, Inc., FILED, Service date 07/13/2015 by US mail, CM/ECF. [1552019][15-1086] [Entered: 07/13/2015 01:01 PM]
07/13/2015	37	JOINT APPENDIX, volume 1 of

Date	#	Docket Text
		2, (pp. 1-300), on behalf of Appellant Laroe Estates, Inc., FILED. Service date 07/13/2015by US mail, CM/ECF.[1552024][15-1086] [Entered: 07/13/201501:04 PM]
07/13/2015	38	JOINT APPENDIX, volume 2 of 2, (pp. 301-594), on behalf of Appellant Laroe Estates, Inc., FILED. Service date 07/13/2015 by US mail, CM/ECF.[1552029][15-1086] [Entered: 07/13/201501:07 PM]
		* * *
07/13/2015	40	CURED DEFECTIVE DOCUMENT: BRIEF & APPENDIX, [35], on behalf of Appellant Laroe Estates, Inc., FILED.[1552225][15-1086] [Entered: 07/13/201502:53PM]
		* * *
10/13/2015	51	BRIEF, on behalf of Appellee Planning Board of the Town of Chester, Town Board of the Town of Chester and Town of Chester, FILED. Service date 10/13/2015 by CM/ECF. [1618059][15-1086] [Entered: 10/13/201503:30 PM]
		* * *

Date	#	Docket Text
10/19/2015	57	BRIEF & SPECIAL APPENDIX, on behalf of Appellant Laroe Estates, Inc., FILED. Service date 10/12/2015 by CM/ECF. [1622269][15-1086][Entered: 10/19/201512:53PM]
		* * *
10/26/2015	60	REPLY BRIEF, on behalf of Appellant Laroe Estates, Inc., FILED. Service date 10/26/2015 by US mail, CM/ECF. [1627203][15-1086][Entered: 10/26/201509:18AM]
		* * *
01/27/2016	68	CASE, before GC, GEL, RJL, C.JJ., HEARD.[1692609][15-1086][Entered: 01/27/2016 01:18PM]
07/06/2016	71	OPINION, the district court judgment is vacated and remanded, by GC, GEL, RJL, FILED.[1808129][15-1086][Entered: 07/06/2016 09:22 AM]
		* * *
07/06/2016	73	CERTIFIED OPINION, dated 07/06/2016, to SDNY (NEW YORK CITY),

Date	#	Docket Text
		ISSUED.[1808143][15-1086] [Entered: 07/06/2016 09:29AM]
		* * *
07/06/2016	78	JUDGMENT, FILED.[1808812] [15-1086] [Entered: 07/06/2016 02:21 PM]
07/27/2016	79	JUDGMENT MANDATE, ISSUED.[1826760][15-1086] [Entered: 07/27/2016 03:13 PM]
09/28/2016	81	U.S. SUPREME COURT NOTICE, granting Appellee Planning Board of the Town of Chester, Town Board of the Town of Chester and Town of Chester extension to file Writ of Certiorari, FILED.[1874191][15-1086] [Entered: 09/29/2016 03:30 PM]
11/03/2016	82	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 11/03/2016, U.S. Supreme Court docket # 16-605, RECEIVED.[1901434][15-1086][Entered: 11/07/2016 11:18 AM]
01/17/2017	83	U.S. SUPREME COURT NOTICE, dated 01/13/2017, U.S. Supreme Court docket # 16-605, stating the petition for writ of certiorari is granted,

Date	#	Docket Text
		RECEIVED.[1948897][15-1086][Entered: 01/17/2017 03:29 PM]

SUPREME COURT OF THE
STATE OF NEW YORK COUNTY OF ORANGE

No. 2012-000332

STEVEN M. SHERMAN,

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD,
AND ITS PLANNING BOARD,

Defendants.

COMPLAINT

Plaintiff STEVEN M. SHERMAN, through his attorney MICHAEL D. DIEDERICH, JR., complains of the DEFENDANTS as follows:

Introductory Statement

After making application to the Town Planning Board in 2000 seeking subdivision approval so that he could use and profitably sell the real property that he had acquired, the Town of Chester employed its police powers in a manner that has deprived Plaintiff of the use and enjoyment of his 398 acres of land ("MareBrook"). Consequently, Plaintiff sought relief from the federal courts in *Sherman v. Town of Chester et al,* 08 Civ. 4248 (VLB) in May 2008. In that federal action, the Defendant Town of Chester urged that the State courts should adjudicate

the matter. Plaintiff agrees that the State courts are a more appropriate forum at this juncture; has voluntarily dismissed the federal action; and brings this action within 30 days thereof as permitted by 28 U.S.C. § 1367(d).

THE PARTIES

1. Plaintiff STEVEN M. SHERMAN is and was, at all times relevant herein, a citizen of the United States and a resident of the Town of Monroe, County of Orange, and State of New York.

2. Defendant TOWN OF CHESTER (hereinafter "Defendant Town" or "Town") is and was, at all times relevant herein, a municipal corporation organized and existing under the laws of the State of New York, with its Town Hall located at 1786 Kings Highway, Chester, NY 10918.

3. Defendant TOWN BOARD OF THE TOWN OF CHESTER (hereinafter "Town Board") is and was, at all times relevant herein, the duly elected governing body of the Defendant Town.

4. Defendant PLANNING BOARD OF THE TOWN OF CHESTER (hereinafter "Planning Board") is and was, at all times relevant herein, the duly appointed planning board of the Defendant Town.

FACTUAL ALLEGATIONS

A. Plaintiff's sound land use proposal—the MareBrook Project

5. Plaintiff is a real estate developer and owner of a substantially undeveloped 398 acre parcel of land (hereinafter "MareBrook"[1]) located in the Town.

6. Plaintiff contracted for the acquisition of MareBrook in 2000 with a view toward using and developing the land in an economically-profitable and environmentally-sound manner, consistent with surrounding land use and character of the community.

7. For many years before Plaintiff's purchase of MareBrook, and up through the present, Plaintiff's MareBrook land has been zoned to allow for residential use.

8. When Plaintiff contemplated purchasing the MareBrook property between 1999 and 2001, MareBrook contained potentially 568 buildable lots under the Town's zoning and its land use Master Plan.

9. In March 2000, Plaintiff applied to the Town's Planning Board for subdivision approval so that he could use and develop MareBrook.

---

[1] Plaintiff uses this name because the land had been a horse farm, including a stream. Plaintiff's original proposal included equestrian recreation, with the proposed development named "MareBrook Estates." MareBrook is also denominated in land use applications as "Chester Golf" or "Chester Golf Club," which property is located on six tax parcels near or adjoining Bull Mill Road, Laroe Road and Gibson Hill Road in the Town. The Tax Parcels are section 8, block 1, lot 20 & 56 and section 1, lots 9.1,9.2,65.1 and 65.2.

B. Original MareBrook proposal, with Golf Course

10. Plaintiff's proposed MareBrook project was for residential housing totaling 385 units, located upon 398 acres, in a new community featuring an equestrian facility, baseball field, tennis courts, clubhouse, on-site restaurant and a golf course that wove through the property.

11. A conceptual map depiction of Plaintiff's original proposal, the "MareBrook project," is annexed as Exhibit "1".

12. Under Plaintiff's original MareBrook Project proposal, the golf course and other recreational facilities would be available to both the residents of the new community and the public at large, including all residents of the Town of Chester.

13. Plaintiff's proposed MareBrook project, including its recreational facilities and the number of residential housing units proposed, was fully consistent and permissible under the Town's existing zoning, its zoning policies, and the existing 1974 land use Master Plan.[2]

14. Plaintiff's proposed MareBrook Project was also fully consistent and permissible under the Town's subsequently revised Master Plan, which was adopted in May 2003; and it was consistent in nature, purpose and extent with all of the zoning ordinances and zoning ordinance amendments that

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[2] Comprehensive Plan" and "Master Plan" plan are used interchangeably herein, and with the same meaning.

the Town Board subsequently enacted (ostensibly in furtherance of the Town's 2003 Master Plan).[3]

15. The MareBrook Project never involved greater housing density on the parcel than was generally found and permitted in the Town. Plaintiff's proposal, including the proposed number of housing units, was appropriate for the acreage of the proposed development, the natural characteristics of the land and the suburban character of the local community.

16. Plaintiff's MareBrook Project, as originally proposed, would significantly enhance the land uses that characterized this area of the Town and would be of significant benefit to the Town; including, but not limited to, providing quality housing, especially to retired and semi-retired people desiring pleasantly-situated housing with associated recreational and social facilities.

17. Plaintiffs project, as originally proposed, would have created a significant tax ratable for the Town and otherwise be economically beneficial to the Town and the community.

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[3] In New York State, a municipality's zoning ordinance should implement the municipality's master or comprehensive plan. A community's Master Plan should be its "blueprint" for development. As stated in a N.Y.S. Department of State publication entitled Creating the Community You Want: Municipal Options For Land Use Control (2009), at page 2: "Zoning is a land use technique that can be used to help implement a municipality's [master] plan." *See*, http://www.dos.state.ny.us./lp/publications/Creating the_Community_You_Want.pdf

18. At the time of Plaintiff's MareBrook application in 2000, and through today, there is a regional need for housing for active-retired and semi-retired people. Plaintiff intended to market his MareBrook Project to such individuals by providing affordable housing with a variety of recreational and social facilities and amenities.

19. At the time of Plaintiffs original application, and continuing thereafter, the Town Planning Board was very receptive towards and expressed a great liking for Plaintiff's MareBrook Project.

20. However, with the intention of keeping Plaintiff's MareBrook land undeveloped and largely forested, the Town Board, as the Town's legislative and policy-making body, undertook a course of action, which had the design and effect of obstructing and preventing Plaintiff from using, subdividing and developing his property.

21. The intention and result of the Town Board's acts and omissions regarding MareBrook has been to create a *de facto* nature preserve. MareBrook adjoins Goose Pond Park, a New York State park.

C. Town's obstruction of MareBrook Project

22. The means and strategy employed by the Town to obstruct Plaintiff's ability to use and develop MareBrook was through a continuous series of changes of its land use regulations, both via Town Board legislation and the Town administration of its land use application process.

23. First, between 2001 and mid-2007, the Town employed tactics of constantly zoning and re-zoning Plaintiff's land with repeated changes to the Town's land use ordinances.

24. In addition, the Town Board refused to act on Plaintiffs MareBrook application when such action was needed by the Planning Board, obstructing Plaintiff from obtaining subdivision approval.

25. After Plaintiff filed a federal lawsuit on May 5, 2008, the Town changed its tactics, but not its strategy of obstruction. It asserted its regulatory power through administrative means, using bureaucratic and procedural means and its consultants to continue to obstruct Plaintiff's subdivision application.

26. In addition to asserting its regulatory powers, the Town has infringed upon and denied Plaintiff's First Amendment right to petition local government for redress of grievances relating to the Town's actions.

27. In this regard, the Town retaliated against Plaintiff for his attempted exercise of his constitutional right to petition government.

28. Specifically, after filing his federal action seeking the federal Court's help in May 2008 (a judicial petition), the Town engaged in administrative obstruction, including:

- refusing to allow Plaintiff to appear and further process his application before the Planning Board, with no proper reason and no reason given;
- imposing unreasonable and unjustified demands upon Plaintiff from the Town's technical consultants (e.g., its planner and its engineer, and their successors);
- imposing unreasonable, unauthorized, duplicative and grossly excessive financial exactions in the form of consultant fees; and

- demanding much more than what was reasonable to demand or require of Plaintiff in connection with the Final Environmental Impact Statement ("FEIS"), which the Town required of Plaintiff before considering preliminary approval, at an exorbitant cost of money and time.

29. As to the above, Plaintiff has been singled out for hostile and adverse treatment by the Town.

30. Plaintiff has been singled out because the Town Board prefers a *de facto* nature preserve rather than reasonable residential development.

31. Additionally, upon information and belief, the Town's hostility toward Plaintiffs residential development of his land includes the fear that the residential housing may become inhabited by ultra orthodox or Hasidic Jews, and that an ultra Orthodox Jewish village could be created. Specifically, some of the Town's voting public has been fearful that Plaintiff's MareBrook could become a potential Hasidic community such as that found in the nearby Village of Kiryas Joel.

32. Plaintiff is Jewish, and has enjoyed the help of Orthodox Jewish affiliates and lenders in pursuing MareBrook. Upon information and belief, this has also caused anti-Semitic hostility toward his project. For example, his model home located on MareBrook has been vandalized with spray-painted Nazi swastikas—vandalization which is the product of local hostility towards Orthodox Jews.

33. Although Plaintiff's land use application remains pending before the Town's Planning Board, he has lost almost his entire initial investment and

subsequent financial contributions and labor as a developer.

34. Specifically, as a result of the obstruction by the Town summarized above (and set forth below in detail), by 2011, Plaintiff has lost over 90% of his financial interest in MareBrook, which property remains unusable and undevelopable without subdivision approval.

35. Plaintiff may suffer a complete loss of his investment and invested funds, and face personal bankruptcy.

36. Plaintiff has already experienced foreclosure and collection action; and his commercial lender has obtained a personal judgment against him in the sum of over $4 million.

37. Because Plaintiffs economic interest in MareBrook has been almost entirely destroyed by the actions of the Town, his business enterprise essentially ruined, and his labor as a developer lost, he seeks relief from this Court.

38. A chronology of local governmental abuse committed by Defendant is described in detail below.

D. Years 2000-2002

39. Plaintiff's original 2000-20001 expenditures for the MareBrook project included the approximately $2,700,000 purchase price; and, thereafter, carrying costs (mortgage interest, taxes, etc.).

40. After contracting for the purchase of MareBrook, Plaintiff began preparing a conceptual map, which was developed through meetings with the Town's Planning Board through the Spring of 2000.

41. In April 2000, Plaintiff formally submitted his MareBrook subdivision application to the Town Planning Board.

42. The Planning Board declared itself "lead agency" under SEQRA on June 21, 2000; and thereafter, in November of 2000, conducted a public hearing on the scope ("scoping session") required by SEQRA.

43. The Planning Board was very receptive and enthusiastic about Plaintiff s MareBrook Project, recognizing that the project's attractiveness and qualities were fully consistent with Town's land use philosophy and community character.

E. July 2001 Moratorium

44. The Planning Board appeared to embrace and like the substance and conceptual details of Plaintiff's proposal.

45. However, after Plaintiff began making substantial progress in putting together an application suitable for full consideration by the Planning Board, the Town Board announced, on or about July 1, 2001, that it was imposing a "six-month moratorium" on major subdivision approvals, retroactive to May 1, 2001.

46. The Town Board's Moratorium appears to have been enacted to apply only to Plaintiff. He was singled out by it.

47. At least two members of the Town Board (council members Florio and Grumbach) expressed the view that the Moratorium was specifically aimed at Plaintiff's MareBrook project.

48. Plaintiff was the only developer affected by the Moratorium, even though several developers had

pending projects before the Planning Board and were not differently situated.

49. As to the Moratorium, Town Supervisor William Tully announced that any land use application formally submitted before May 1, 2001 could continue. Plaintiff's application had been submitted before May 1, 2001, yet Supervisor Tully and the Town Board regarded his project as subject to the Moratorium, singling Plaintiff out for adverse treatment.

50. In November 2002, the Town extended its Moratorium beyond the initial period of six months provided by the Moratorium law, in contravention of its own local law. Plaintiff was singularly affected.

51. Plaintiff then sued the Town under CPLR Article 78 to end the Moratorium.

52. As a result of Plaintiff's lawsuit, the Town ended its Moratorium in January 2003.

53. Nevertheless, the Town thereafter continued what has amounted to an ongoing *de facto* moratorium regarding the development of the MareBrook land. It has accomplished this by constantly changing its land use laws and requirements whenever Plaintiff's MareBrook application neared decision on preliminary approval (an important stage under New York land use law).

F. Town's refusal to consider Plaintiff's petition for a minor subdivision

54. As Plaintiff needed some positive cash flow because of the delay caused by the Moratorium, in December 2001, Plaintiff sought a minor subdivision approval in order to sell a portion of his 398 acres of MareBrook land.

55. A minor subdivision of land was permissible in 2001, even under the Town's Moratorium.

56. Plaintiffs minor subdivision application was essentially a petition to the Town to partially redress Plaintiff's grievance that the Town's Moratorium law was preventing Plaintiff from using, developing and selling his land.

57. However, the Town refused to permit Plaintiff to pursue a minor subdivision application.

58. There were no justifiable grounds for the refusal to allow Plaintiff the approval of a minor subdivision. A minor subdivision is 4 or fewer lots. It would have imposed no burden upon the Town to have allowed Plaintiff to sell some of his property by allowing a minor subdivision. Doing so would have permitted Plaintiff at least some economic use of his land.

59. By denying Plaintiff the ability even to propose a minor subdivision, the Town denied Plaintiff a basic property interest in land, namely, the ability to use and sell property.

60. In denying Plaintiff the ability to apply for a minor subdivision, the Town deprived him of the right to petition Town government for redress, namely, to be allowed to use, subdivide and profitably engage in a developer's trade—the profitable improvement and sale of land.

61. In denying Plaintiff the ability to apply for a minor subdivision, it appears that the Town was also retaliating against him for having availed himself of his First Amendment right to petition government to redress grievances, namely, his Article 78 challenge to the Town's Moratorium.

G. MareBrook Project resumes in 2003

62. After the Town lifted the Moratorium in January 2003, the Town's Planning Board examined the "scope" that was previously addressed in 2000; and approved a revised scope in March 2003, as a prelude to the preparation of an Environmental Impact Statement ("EIS").

63. On March 3, 2003, the Planning Board directed Plaintiff to proceed with the Draft Environmental Impact Statement ("DEIS")—a document comprised of 3 volumes totaling over 1000 pages of narrative, charts, tables and maps. Plaintiff also prepared a full 62 page set of engineered subdivision plans for the MareBrook Project. The DEIS and plans were given to the Planning Board and its consultants (Planner Garling Associates and Town Engineer Gerald Macdonald) in late March 2003.

64. Plaintiff then continued with his application (a petition to the Town) before the Planning Board, taking into full consideration the Town's new May 2003 Master Plan. This new Master Plan was adopted on May 1, 2003, which was almost exactly two years after the effective date of the Moratorium.

65. The 2003 Master Plan was not significantly different from the prior Master Plan regarding the character and nature of land uses allowed or desired by the Town. There was nothing in the new Master Plan that contradicted or disfavored the uses proposed by Plaintiff. Plaintiff's proposal remained completely consistent with the new Master Plan.

66. Planning Board members were on the committee that helped formulate the proposed 2003 Master Plan, which Master plan emanated from the Morato-

rium. The Town's planner, Garling Associates, was a principal author of the new Master Plan; and also was and remained the planning advisor to the Planning Board.

67. Upon information and belief, if the new Master Plan had identified or created new environmental considerations or issues for Plaintiff's MareBrook Project, the Planning Board could and would have required that these be identified and added to the MareBrook DEIS.

68. The Planning Board did not raise any new considerations or issues of environmental concern regarding MareBrook relating to the Town's May 1, 2003 Master Plan.

69. During the next few months, Plaintiff and his consultants worked with the Town's consultants in creating a DEIS deemed acceptable by the Planning Board and "complete" for its consideration.

H. MareBrook application "deemed complete" by Planning Board

70. After various reviews and changes made during the Summer and early Autumn of 2003, Plaintiff's DEIS was "deemed complete" by the Planning Board on October 15, 2003, meeting all zoning and 2003 Master Plan requirements.

71. Plaintiff submitted a full set of final subdivision plans and drawings with his now complete DEIS.

72. Plaintiff expended a great deal of money, and a large investment in time, in satisfying the Planning Board that his 1000+ page DEIS was now "complete."

73. Being "deemed complete" is an important determination, because it established that Plaintiff's application to the Town was now satisfactory in form and content and complied with the new Master Plan. Completeness also triggers the start of the 62 days within which the municipality must act on the application, under N.Y.S. Town Law § 274-a.

74. Thus, at this point in time, namely, with a complete DEIS accompanying his application, subdivision plans and drawings, Plaintiff was entitled to a formal hearing on his application by the Planning Board within 62 days.

75. A municipality's failure to provide such a hearing entitles the applicant to a default approval, upon request, under N.Y.S. Town Law § 276 (8).

76. Thus, the Town had 62 days to afford Plaintiff a hearing on his application for preliminary approval. Otherwise, it would be deemed approved upon Plaintiff's request under the default approval provision of state law.

77. Plaintiff did not receive the required hearing. Plaintiff eventually requested a default approval under Town Law § 276 (8), after it became apparent that the Town had been acting in bad faith regarding his MareBrook application (Plaintiff's request has not yet been formally denied).[4]

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[4] There is no time limit contained in the N.Y.S. Town Law (and in particular Town Law § 276(8)) as to when Plaintiff can request from the clerk a "default approval." Plaintiff eventually requested one based upon the Town's obstinacy, its constant changing of its land use requirements, and its refusal to act in

78. Sherman Expenditures: Costs from the beginning of the project (other than land purchase costs) through the DEIS/application being "deemed complete" by the Planning Board in October 2003 were approximately **$684,869**.

79. Plaintiff would not have expended this huge sum had the Town's officials not affirmatively led him to believe that they very much liked, and would approve,[5] his MareBrook proposal.

80. The above $684,869 includes engineering work, preparation of the DEIS, preparation of subdivision maps and drawings, some general infrastructure costs, and some actual development costs including installation of wetland fencing and the cost of a "model home."[6]

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good faith toward his legitimate interests as a property owner trying to use, develop and/or sell his land.

[5] This is not mere wishful thinking on Plaintiff's part. As described below, the Planning Board subsequently recommended Plaintiff s MareBrook application for approval to the Town Board in 2005 (with the Town Board failing to act on the recommendation).

[6] Plaintiff built, at a cost of approximately $120,000, a 90% completed "model home" for potential purchasers to view, based upon his reasonable expectation that he met all requirements under the Town's land use philosophy, as reflected in its Master Plan, and met all the requirements of the Town's zoning.

[7] Approximately 80% of the Town's real property taxes are earmarked for the local school district.

I. Entitlement to a public hearing on MareBrook Project denied

81. Plaintiff should have received a public hearing by mid-December 2003, in order for the required hearing to be within 62 days from when Plaintiffs MareBrook Project was deemed complete.

82. However, the Planning Board, apparently at the behest of the Town Board and its planner, Garling Associates, refused to schedule a hearing for Plaintiff in December.

83. Rather, it placed Plaintiffs MareBrook Project on the Planning Board agenda for early January 2004, which formal meeting was then canceled due to a lack of a Planning Board quorum. The board members (conveniently) failed to appear, upon information and belief, at the behest of the Town Board's planner and/or engineer.

84. Shortly thereafter, Plaintiff learned that the Town Board had, without notice to Plaintiff, changed the Town's zoning with a new zoning ordinance effective in late December 2003 (hereinafter "December 2003 Zoning").

85. Upon information and belief, the Town Board took unlawful shortcuts in enacting its December 2003 zoning law, in order to stifle and obstruct Plaintiff's MareBrook application.

86. Upon information and belief, the Town failed to refer its proposed zoning changes to the Planning Board and/or Orange County Department of Planning, as required by N.Y.S. GML 239-1 and § 239-m, or notify adjoining towns if the zoning amendment was town-wide; and failed to refer the proposed zoning changes to the Planning Board for a report, as

required by Chester Town Code § 98-39 before a zoning amendment can be adopted.

87. In February of 2004, the Town's consultants, including Town Planner Garling Associates, informed Plaintiff of the new December 2003 Zoning.

88. Garling Associates assured Plaintiff that with a modest amount of additional work, Plaintiff could meet all requirements of the December 2003 Zoning. The new zoning was described as being consistent (as it must be) with the Town's May 2003 Master Plan; and Plaintiff's MareBrook Project, when it was deemed complete in October 2003, was at that time viewed by the Planning Board as being in conformity with the 2003 Master Plan.

89. Therefore, Garling Associates assured Plaintiff that he could soon obtain preliminary subdivision approval from the Planning Board under the new December 2003 zoning.

90. Had the Town and its consultants not pushed through the new December 2003 zoning law, and had it not unlawfully denied him a hearing on his application for preliminary approval, Plaintiff would have had received preliminary subdivision approval in mid-December 2003.

J. January 4 – June 2004

91. Through the delay of Plaintiff's public hearing date into January 2004, Plaintiff could have promptly sought and obtained a "by right" default approval, which default approval he did not seek because of the inducements the Town promised, as described below.

92. Thus, Plaintiff would have received a substantial vested right to his MareBrook Project, namely,

preliminary approval of his subdivision application if the Town had not made a last minute zoning change.

93. The Town's representatives gave assurances that the new zoning would not materially impact Plaintiffs project. It gave Plaintiff inducements to proceeding forward with his application.

94. For example, in January 2004, Plaintiff accepted Garling Associates' representations and assurances at face value that Plaintiff would soon be able to obtain preliminary approval from the Planning Board.

i. Potential remedy of default approval would be Pyrrhic victory

95. These assurances were the principal reason that Plaintiff did not consider seeking a legal remedy, such as pursuing a default approval in early 2004.

96. The application still needed final approval from the Planning Board. Thus, receiving a default approval would most likely be a Pyrrhic victory since it would anger the Town and further delay and otherwise prejudice the application. Thus, the most sensible approach for seeking preliminary approval was for Plaintiff to be as cooperative as possible with the Town.

ii. Plaintiff seeks to comply with the new zoning

97. Because insistence upon a default approval would be an unsatisfactory result, as the result would be a non-conforming use, it would serve little beneficial purpose and undoubtedly be futile for Plaintiff to do anything other than to diligently

proceed forward and promptly comply with the new December 2003 Zoning.

98. However, the December 2003 Zoning had thrust several regulatory changes upon Plaintiff and his MareBrook Project.

99. Section 98.25 of the new December 2003 zoning code changed the zoning requirements for lots. The new zoning required a 100 foot buffer from streams located within MareBrook, namely, Seeley Brook, Trout Brook and Walden Creek, and required buffers from wetlands. The zoning law change required that Plaintiff reconfigure his subdivision map to move homes away from the streams, forcing Plaintiff, at considerable expense, to reengineer a large number of lots and large segments of the proposed roads.

100. The Town, through new Zoning Code § 98.25, enacted a floating zone called a Planned Adult Community, or "PAC," in the SR-2 zone, and made any proposed PAC subject to Town Board approval. Plaintiff had been induced by the Town to add a PAC to his MareBrook Project application because it would give him the unit count (number of homes) economically necessary to continue with a golf course.

101. This required a new engineered plan for the SR-2 area of the property, as the type of housing and lot sizes had to be changed again with a considerable expenditure of time and money.

102. Additionally, the December 2003 Zoning law made the Town Board the approval authority for clustering.

103. Plaintiff applied for clustering, and devoted considerable resources to incorporating clustering into his MareBrook application, especially as he was induced to do so by the Town through its grant of a "density bonus" in its December 2003 zoning. This delayed the Planning Board for several months because the December 2003 zoning required the approval of the Town Board for clustering.

104. Plaintiff would not have sought clustering if he had known that the Town's grant of a "density bonus" (an incentive for the developer to cluster in the Town's AR.3 zoning district) was really only a ploy by the Town—a disingenuous invitation to pursue a desirable technique for land use development (clustering) while intending only to delay Plaintiff and not grant the clustering request.

105. From early January 4, 2004 through late May/early June 2004, Plaintiff revised his MareBrook Project application by taking such actions, such as reconfiguring his subdivision map to move homes away from the streams; creating a new engineered plan for the SR-2 area of the property for a PAC; and seeking the Town Code-required approval from the Town Board for clustering and the PAC.

106. Additionally, in order to be granted a "density bonus" by the Planning Board, the builder was required to demonstrate that he could place a house on a 2 acre mapped lot with a minimum 25 foot depth and a 5,000 square foot (but not necessarily rectangular) footprint. Plaintiff devoted considerable effort to meeting this requirement.

107. Plaintiff was also forced to reduce the number of townhouses under the PAC formula to a maximum of 40 apartments, and up to 185 single family units.

As a result, Plaintiff's total number of housing units was reduced from 385 to 365.

108. Before Plaintiff could obtain Town Board approval, the new zoning code required that the Planning Board first approve a clustering plan and a PAC after a yield plan was completed. The Town Board then had to vote on whether or not to accept the PAC and cluster.

109. This requirement—that the Town Board itself approve clustering—was inserted for the first time in the December 2003 zoning. The intent is obvious—to allow the Town Board to supervise the Planning Board regarding Plaintiff's MareBrook application.

110. The December 2003 zoning law provisions requiring Town Board approval of clustering was aimed specifically at Plaintiff, as there were no other clustering applications pending in the Town at that time.

111. The requirement for Town Board approval of clustering also appears to have been illegal, as N.Y.S. Town Law § 278(D)(1) clearly provides that cluster approval is within the exclusive discretion of the Planning Board, not the Town Board.

112. However, this illegality was of no true concern to the Town Board, because secretly it intended to never approve Plaintiff's MareBrook clustering and PAC requests.

113. One indication of this malicious intention is that having (unlawfully) made itself the approving body on cluster zones, the Town Board then failed and refused to act on the Planning Board's request to approve Plaintiffs cluster zone and PAC. Without formal action by the Town Board, Plaintiff could not

move forward with either the cluster plan or the PAC plan under the Town ordinance. The Town Board's inaction intentionally created a roadblock for Plaintiffs MareBrook Project.

114. Further evidence of the Town Board's intent to obstruct Plaintiffs project is found in the conduct of the Town Board's planning consultants, Garling Associates. As mentioned above, Plaintiff was induced by Garling Associates to view the December 2003 zoning amendments as manageable. Yet, Garling Associates was actively involved in changing that zoning again in June 2004 at the very same time that it was advising and directing Plaintiff (and the Planning Board) on how to meet the December 2003 Zoning.

115. Garling Associates further revealed themselves to be agents of the Town Board when, at a Planning Board meeting held in March 2004, Garling Associates purported to be unclear about several provisions of the December 2003 zoning relating to a "yield plan" under the clustering provisions of the Zoning law.

116. These were provisions written by Garling Associates.

117. These alleged uncertainties were then employed by the Town as a means of preventing Plaintiff with going forward on his MareBrook Project.

118. Thus, it appears that the Defendant Town and its agents intentionally enacted a zoning law which, by Defendant's own admission, the Defendant Town viewed as unclear and ambiguous on its face.

119. The Town Board's subsequent 2004 zoning law thus denied Plaintiff the ability to proceed with his

proposal when, on its face, it was fully consistent with and approvable under both the Town's new 2003 Master Plan and its December 2003 Zoning.

120. Plaintiff, at this point in time, had devoted substantial money, time and labor resources in his MareBrook Project; had a deemed complete DEIS; and had been given substantial assurances by the Town and its representatives.

121. At this point in time, his property right became vested under the N.Y.S. Court of Appeals teachings in *Glacial Aggregates LLC v Town of Yorkshire*, 14 N.Y.3d 127, *rearg denied* 14 N.Y.3d 920 (2010).

122. Specifically, Plaintiff justifiably thought, and had the right to expect, that the Town's new 2003 Master Plan and 2003 Zoning defined what he was or was not permitted to do regarding MareBrook, and that the Town's assurances that satisfying the modest changed requirements imposed by its December 2003 Zoning would result in approval of his MareBrook Project. This is especially so since a simple "conventional" subdivision design would, on its face, be approvable, even though such a conventional design would be a more intensive use.

123. The Town's post-December 2003 actions toward Plaintiff's MareBrook proposal (such as imposing stringent environmental review and other technical requirements and repeatedly revising its land use laws in direct response to Plaintiff's application) were as if the Town's new zoning law was a profoundly significant change in its zoning law and policy for land such as MareBrook.

124. Yet, this could not legitimately be the case, as the Town had issued a "negative declaration" ("NegDec") under the environmental impact review requirements of the N.Y.S. Environmental Quality Review Act ("SEQRA"). *See*, N.Y.S. Environmental Conservation Law article 8.

125. In so doing, the Town made an official finding that no environmentally significant effects would result from its proposed December 2003 zoning law, nor the subsequent re-zonings (which were also NegDec'd).

126. Its land use law changes could have a profound impact on the environment (especially sequential changes, stifling developers' ability to know what the Town's land use philosophy is). Therefore, the Town should have prepared its own EIS or generic EIS, or supplemental generic EIS (if one had been prepared for the 2003 Master Plan).

127. The Town's NegDec's were, upon information and belief, both disingenuous and a perpetration of fraud upon Plaintiff. The NegDec's corroborated the representations of the Town's consultants and Town Supervisor that the Town's new zoning laws (singularly or cumulatively) were not a big change, and would have little impact upon Plaintiff's MareBrook application and its approval. Yet, in actuality, the Town Board was singling out Plaintiff's MareBrook application for obstruction and denial.

128. The Town was engaging in a strategy of constantly making huge "environmental" demands of Plaintiff regarding revising and updating his DEIS, and then demanding a Supplemental Draft EIS ("SDEIS") even though Plaintiff's original DEIS had already been "deemed complete" by the Planning

Board in October 2003; and, otherwise, abusively applying SEQRA, even up to today in connection with Plaintiff's FEIS.

129. Thus, the Town's NegDec's characterized the Town's zoning law changes as environmentally insignificant. Yet, in actuality, the only way Plaintiff's MareBrook application could be viewed as not involving potential environmental impacts under the Town's new zoning and re-zoning would be if the Town intended never to allow Plaintiff's MareBrook proposal. This is further evidence that Plaintiff was being singled out for adverse action by the Town.

130. Further in this regard, one of the Town's principal consultants has admitted that the Town was singling out Plaintiff for adverse treatment. The Town engineer acknowledged this, by stating in a letter dated on June 6, 2007 that the Town's zoning was twice amended, on June I, 2004, and again on June 7, 2005, to "clarify" what Plaintiff was entitled to build under the Town's zoning.

131. Specifically, three years after the Town's 2004 zoning change, the Town Engineer wrote in his letter dated June 6, 2007 that:

> "[we have had] several questions of the new Zoning Amendments on the language and intent of the yield plan. Especially the Cluster Bonus Provisions in 98-25C and the 'LOTS TO BE BUILDABLE' section of the Subdivision regulations 83-22. These reviews and discussions with the applicant resulted in Town Board Zoning Amendments to provide further clarifications (June 1, 2004 and June 7, 2005). Also the PAC design now required a 25 foot setback or buffer."

132. This letter reveals that the re-zonings were directed specifically at Plaintiff. Plaintiff was being singled out for adverse zoning treatment by the Town. It states that the rezoning were to "provide further clarification." Yet, Plaintiff did not regard the 2003 zoning as unclear. Rather, Plaintiff believes the zoning, and Plaintiff's ability to subdivide and develop MareBrook, was absolutely clear under the December 2003 Zoning.

133. The zoning law changes were enacted by the Town Board as a device to be used to delay and obstruct Plaintiff's MareBrook Project. No other pending land use applicant was similarly adversely affected.

134. As described below, each of the new zoning law amendments imposed unnecessary and unreasonable requirements upon Plaintiff, such as requiring completely new yield plan maps, entirely new subdivision plans, and unnecessary modifications to Plaintiff's DEIS.

K. June 2004 Zoning changes/amendments

135. Notwithstanding Garling Associates assurances, the Town's new June 2004 zoning regulations were major changes that required an almost complete revamping of the MareBrook Project. The new zoning contained, among other things, a new prohibition regarding condominiums, a "concept plan" requirement for any PAC, and new, unreasonably-convoluted clustering.

Condominiums

136. In the Town's June 2004 zoning amendments, the Town prohibited condominiums; and, instead, demanded only single family dwellings. This change

(enacted after a NegDec despite its societal and potential environmental impact) would possibly increase Town real property taxes, but would result in less diversified housing and less affordable housing for the elderly—the very people the Town ostensibly sought to aid through its demands that Plaintiff create a PAC.

137. Plaintiffs MareBrook Project had included condominiums, as this form of ownership reduced the real property taxes paid on each home by approximately 30%. With the 2004 zoning amendment, the residents in the (supposedly more affordable) Planned Adult Community would be forced to pay 50% more in local real property taxes than they would if allowed to live in condominiums.

138. This was irrational because the PAC community, by definition, would not generate school age children. In a "senior" community, there was no rational basis for denying prospective owners the ability to purchase a condominium.

139. As a result, Plaintiff could only sell town houses to potential buyers due to the Town's demand, which imposed higher real property taxes upon these senior residents.[7]

140. The elimination of condominiums and attendant increased cost impaired the potential profitability of Plaintiff's originally-proposed PAC community. Plaintiff was compelled by the 2004 zoning code changes to revise his proposal so that all PAC

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[7] Approximately 80% of the Town's real property taxes are earmarked for the local school district.

units within the MareBrook Project were single family ranch houses.

141. For example, sufficient PAC housing density was required in order for Plaintiff to economically afford open space and public recreation for Plaintiff's proposed MareBrook golf course, yet the Town did not address these aspects of its proposed land use law in an EIS prior to enactment.

142. The above issues should have been addressed by the Town in the form of an EIS regarding its proposed December 2003 and subsequent zoning law enactments, but were not. The Town NegDec'd its proposed zoning law changes; and then enacted zoning changes that required a great deal of time, effort and expenditure by Plaintiff.

143. By not undertaking SEQRA review of its proposed zoning law changes, the Town left land use applicants, such as Plaintiff, in the dark regarding Town policy and preferences. It left applicants and citizens alike in the dark as to what the Town deemed to be environmentally significant in land use matters.

"Concept plan" for a PAC

144. A second zoning change was the Town's new requirement that a concept or "sketch" plan be developed for a PAC. *See*, Town Code § 98.25 (C & D). In order to demonstrate suitable acreage and access, the Town declared that a concept plan shall be provided showing roadways, open spaces, housing areas, wetlands, recreation areas and other site features in a broad conceptual fashion adequate for the Planning Board to determine suitability of the site for a PAC district.

145. This new "Concept Plan" procedure created a huge amount of unnecessary work on Plaintiff's part. Specifically, it forced Plaintiff to engineer the total useable land, and show a detailed layout conforming to the restrictions before going to the Town Board for a PAC.

146. This new procedure appeared targeted at Plaintiff, and designed to further burden and obstruct his MareBrook Project, as his was the only PAC application.

Town's demands regarding "Clustering"

147. The Planning Board also could require "clustering" or "average density" zoning. The procedures are set forth in Code § 98.25(C), and essentially involve a process, which could be unreasonably applied, as it was toward Plaintiff, to force a developer to essentially prepare plans and documentation for two types of development rather than one.

148. First, under the Town's clustering ordinance, the developer must submit a sketch plan. Then, the developer and Planning Board must discuss whether clustering will result in "benefits to the Town" (§ 98-25(C)(1 & 2). Next, if the Planning Board determines that clustering "may be appropriate," it must direct the developer to prepare a "yield plan" essentially showing what would be allowed under conventional ("by right") zoning. The Planning Board then decides "allowable density" based upon what it deems an "acceptable yield plan." The developer can then submit a "sketch cluster plan" to be used at a "preliminary public information meeting." (§ 98-25(C)(3).) After the Planning Board accepts the developer's conventional/yield plan meets all requirements, it "may" hold the above-mentioned

preliminary public information meeting, after public notice, inviting the public to ask questions and make comments. (§ 98-25(C)(4)). Then, "upon receipt of acceptable cluster and conventional or yield plans .., as reviewed to determine conformance with the Town regulations, the Planning Board shall begin SEQRA review...."

149. Upon information and belief, the new procedure appeared designed to burden and obstruct Plaintiffs MareBrook Project because Plaintiff had petitioned the Town to allow what any impartial observer would regard as a land use more desirable than a conventional design, namely, clustering of homes around open space (Plaintiff's proposed golf course) and woods.

150. These new clustering provisions greatly burdened Plaintiff by imposing a substantial cost in time and money in attempting to satisfy the Town's new procedural requirements.

Other June 2004 zoning requirements

151. The new June 2004 zoning changes/amendments imposed other burdensome requirements as well.

152. Section 98-30 was substantially changed from how it appeared in the December 2003 ordinance. Now, in 2004, the zoning change imposed a 25 foot buffer from any federal wetland to the buildable 5000 square foot area for a house on each lot. It also required at least a 100 foot buffer from any stream high water mark to a house; and required that there be no disturbance within 50 feet of the high water mark of a stream. These changes necessitated reengineering the location of many lots and roads for

the bonus calculations, the PAC area and the clustered areas, requiring many months of engineering and additional meetings with the Planning Board and its consultants.

153. As a matter of basic fairness (as well as due process), no official or representative of the Town notified Plaintiff of the proposed new June 2004 zoning. Garling Associates did not inform Plaintiff of the impending zoning, even though Garling had meetings with Plaintiff and his MareBrook consultants on a regular basis, such as in connection with the creation of the revised DEIS.

154. Instead, the Town and Garling Associates let Plaintiff spend thousands of dollars working on his plans and MareBrook proposal so that he could meet the Town's new December 2003 zoning, only to change the rules again on him with further re-zoning in June 2004.

155. If Plaintiff had known that there would be further re-zoning, Plaintiff and his consultants would have either ceased work (so that they would not need to duplicate work after the enactment of new zoning), or Plaintiff could have sought to ask the Town Board not to change the zoning in a manner so detrimental to his MareBrook project and application.

156. Moreover, Plaintiff would have had an opportunity to address the environmental aspects of the zoning law changes if the Town had determined its proposed zoning to be environmentally significant (as it most certainly was) under SEQRA, rather than by issuing a NegDec regarding its Town law changes.

157. Sherman Expenditures: Sherman's costs in revising the DEIS from January 2004 through

June 1, 2004 were approximately $117,642. Sherman's costs in revising the DEIS from June 2004 through June 7, 2005, are approximately $130,727.

Impact of 2004 zoning requirements

158. Due to the burdens imposed by the new 2004 zoning, it took approximately 11 months (from June 2004 until May 2005) to again revise his application (again revising the DEIS and plans) to conform to the June 2004 zoning amendments.

159. During these eleven (11) months, Plaintiff worked diligently to comply with the Town's various demands by:

- Submitting a new DEIS in August of 2004;
- Drafting new maps for the yield plan in October of 2004; and
- Cooperating with Garling Associates and the Town Engineer, who gave Plaintiff new lists and changes to undertake, and almost continuously lists and demanded changes until May of 2005.

160. In May 2005, Plaintiff finally was able to put together the revised plans, maps, studies and, most importantly, a revised DEIS (which was satisfactory to the Planning Board).

161. This was achieved after suffering delays imposed by the Town Board's inaction on clustering and a PAC.

PAC & Clustering submission for Town Board approval

162. Plaintiff was successful before the Planning Board, because the Planning Board expressed approval by resolution for Plaintiffs MareBrook pro-

posal, which complied with its wishes as well as the express requirements of the Town's planner, Garling Associates.

163. In particular, as the Planning Board had Plaintiff's newly revised DEIS and Plans, the Planning Board passed a resolution, for Town Board approval, recommending Plaintiff s cluster plan for 143 homes built on one-half acre lots and his PAC. *See*, Planning Board Resolution of May 5, 2005.

164. The Town Board, however, refused to entertain Plaintiff's application as well as the Planning Board's resolution and recommendation.

165. In contrast, the Town Board held monthly meetings with Camp Monroe, a developer that was proposing a similar clustering of over 175 lots. Camp Monroe was allowed to "petition" the Town Board. The similarly situated Plaintiff Sherman was not.

166. The benefits of clustering are many. In particular, clustering is a favored residential land-use planning technique because it allows for reduced infrastructure and maintenance costs; less costs in municipal services; and more open space and preservation of natural resources and produces a better quality of life for its residents, at lower cost, with more open space and environmental protection. Because it is a favored device, with such community and municipal benefits, developers are often provided incentives to undertake clustering. Plaintiff was told that the Town was in favor of clustering residential units. The Planning Board members were strongly, and unanimously, in favor.

167. As to the PAC, Garling Associates encouraged this, as did the Town engineer and Supervisor Tully.

168. Supervisor Tully, for example, told Plaintiff that the PAC would be approved by the Town Board, that Plaintiff need not proceed with only ½ acre lots, and that he should incorporate the PAC into his MareBrook project.

169. As a consequence, Plaintiff had his consultants create plans that included clustering. Thus, it is inexplicable why the Town Board refused to favorably act, or act at all, on the Planning Board and Plaintiff's request that it approve Plaintiff's clustering.

Benefits of senior housing/PAC

170. The Town of Chester's 1974 and 2003 Master Plans both endorse the technique of clustering. In particular, the 2003 Master Plan made provisions for and encouraged senior housing.

171. As to a "PAC" becoming part of his MareBrook proposal, this was foisted upon Plaintiff by the representatives of the Town, including Supervisor Tully, whom informed Plaintiff that a PAC was what the Town wanted.

172. Under certain circumstances, "senior" communities, such as the "Planned Adult Community" that Plaintiff originally proposed, can be viewed very favorably. For example, a PAC does not generate school children, yet pays school taxes. Thus, a PAC reduces school taxes for the entire community.

173. Plaintiff's PAC, as per the DEIS, would have reduced Town taxes and school taxes for the community by 16%.

174. The Town should have examined these issues when it enacted and re-enacted zoning relating to Plaintiff's PAC (rather than issuing a NegDec).

175. Plaintiff's MareBrook was the only pending Town application which included a PAC.

176. Based upon the Planning Board being fully in support of his land-use proposal, Plaintiff saw no impediment to the Town Board granting him its authorizations for clustering and a PAC. Plaintiff should have received no opposition from the Town Board. These proposals were Master Plan-compliant, zoning-compliant, SEQRA-encouraged and fully harmonious with the character and nature of the community.

177. Thus, it is inexplicable why the Town Board refused to favorably act, or act at all, on the Planning Board and Plaintiffs request that it approve Plaintiffs PAC.

L. June 7, 2005 through February 2006

178. On June 7, 2005, the Town Board enacted yet another zoning law amendment affecting the MareBrook Project.

179. To Plaintiff's chagrin in June 2005, the Town had <u>again</u> revised its zoning to his detriment without the Town, its agents or representatives, Garling Associates, or the secretive "Zoning Committee," giving Plaintiff advance warning so that he could mitigate his losses or lobby the Town Board on his own behalf.

180. This was especially disconcerting as Garling Associates had worked for an entire year with Plaintiff and his MareBrook consultants in order to develop Plaintiff's revised DEIS and plans for the Planning Board.

181. This new June 2005 re-zoning affected his MareBrook proposal in the following ways.

a) First, almost all the work done from June 2004 through June 2005 would have to be done over as a result of the "new buildable lot" requirement.

b) Second, the zoning required additional changes to the site/subdivision plans, as well as to the DEIS; or, more specifically, the "Supplemental Draft Environmental Impact Statement (SDEIS)."

182. Between June 7, 2005 and February 2006, Plaintiff and his consultants again revised his application (now preparing a SDEIS—"supplement" to the existing DEIS) in order to conform to the new June 2005 zoning amendments. These new requirements included a buildable 5000 square foot box (where before the "footprint" could be any shape) of unrestricted land for a lot to have a house.

Town's "Collector Road" non-cooperation

183. In August 2005, the Town Board also demanded that the County support the PAC road onto the County road; and did not recognize the Town collector road that the zoning allowed.

184. Over a period of many months, the Town Board again refused to act, forcing MareBrook to change its application once more.

185. In particular, the Town's phraseology of the county recommendation for the PAC road to connect to the County road and its refusal to allow the PAC road onto the Town collector road seemed unreasonable and arbitrary.

186. However, the Town Board (i.e., Supervisor Tully) still demanded a letter from the county stating that it "liked" the plan. The County's answer was

that the Town collector road is the preferred design, but they could not prevent a roadway to the County road.

187. However, the County could not (and would not) appropriately say that it "liked" the PAC mad connecting to the County road.

188. Yet the Town Board, under Supervisor Tully's direction, administratively determined that Plaintiff needed to satisfy its demand that the County express its "liking" or preference regarding road access, rather than the Town Board acting based upon what was allowed or prohibited.

189. Consequently, Plaintiff was forced to abandon the PAC because he could not convince Orange County to "like" his proposed collector road access. Plaintiff replaced the PAC with single family, one-half acre lots "by right," in order to move forward on his MareBrook application.

190. If the Town had prepared an EIS regarding its new zoning (instead of NegDec'g it), this "collector mad" issue would have appropriately been discussed and evaluated as part of such review.

191. Between June 2005 and November 2005, Plaintiff also undertook the following:

- Authorized his engineer, and planner to revise the yield maps;
- Drew new plan designs and revised the DEIS; and
- Presented arguments before the Town board that his PAC proposal conforms to and meets all Town codes and regulations, including obtaining a letter from the Coun-

ty restating its position that he could build the road if he met the County's requirements (which he did by changing the plans).

192. In February 2006 Sherman began to revise his project, omitting the PAC.

M. New February 2006 zoning

193. It appears that the Town Board was again engaged in devising an intentional delay of Plaintiff's MareBrook application when it adopted a new zoning amendment in February 2006.

194. Once again, the Town Board's planner, Garling Associates, was preparing the new zoning, but without informing Plaintiff or the Planning Board.

195. The Town Board and its planner reasonably knew that such re-zoning would again nullify most or all of the work Plaintiff had done after its prior June 2005 zoning changes.

196. Among other things, the new zoning changed the buildable box of land without restrictions, from 25 feet deep to a minimum of 40 feet deep, sending Plaintiff "back to the drawing board."

197. Moreover, as Town Engineer McDonald acknowledged in his June 6, 2007 letter, the Town's re-zonings were always targeted at Plaintiff's application. Accordingly, Plaintiff was entitled to, but did not receive, actual notice of this proposed re-zoning.

198. Supervisor Tully was personally, politically and administratively involved in seeking to obstruct Plaintiff's MareBrook project. If Supervisor Tully prevented Plaintiff from developing MareBrook, it would remain wooded, pristine, and as a *de facto* nature preserve (partially adjacent to the State

Park). He would have received the political favor of many people in the Town, especially those residing near MareBrook.

N. March 2007 Re-Zoning

199. In March 2007, after many meetings with the Town Consultants and Planning Board, Plaintiff again submitted a DEIS and plans to the Planning Board, complying with the latest revised zoning regulations.

200. Again, the Garling Defendants did not inform Plaintiff about the new 2007 law, even though he was preparing a SDEIS at considerable expense and was working with the Garling Defendants and the Town engineer for a year on this revised application.

201. However, the Town Board changed the land use rules again in March 2007. It enacted new zoning/subdivision laws, changing the buildable area of a lot for density calculations. A lot must now have 1 acre of non-restricted land (no wetlands, steep slopes, etc) out of the 2 acres.

202. The 2006 law required that the subdivision have enough land to build a house on a 5,000 square foot area with a minimum 40 foot deep "box."

203. The new 2007 one-acre requirement basically eliminated the bonus density; and, since the Town Board has to approve a cluster, this new requirement also eliminated any reasonable application for clustering.

204. Based upon Plaintiffs experience with this Town to this point in time, it would be unreasonable for him to now spend additional hundreds of thousands of dollars engineering a project, only to have a

Town board use "unbridled discretion" to deny the project.

205. Plaintiff would have to again re-engineer the project, but without clustering, while redoing the DEIS.

206. After meeting with the Town consultants in June 2007, Plaintiff ascertained that new plans would have to be drawn for the density bonus and regular lots for the SR 2 district. To determine the new acceptable number of lots, new plans would have to be drawn for the entire project for the bonus density calculations. In addition, the cluster plan would then have to be revised, and a new DEIS would have to be created.

207. After this realization, Plaintiff stopped with his MareBrook application. It had become obvious to Plaintiff that the Town's goal was to financially exhaust him and to continue revising the clustering laws as a means of permanently defeating his MareBrook proposal, whereby MareBrook would remain as undeveloped, pristine woods, a nature preserve bought at Plaintiff's expense for the benefit of everyone else in the Town and the general public.

208. In other words, the Town had taken Plaintiff's property for public use without paying him just compensation since Plaintiff, not the general public, would bear the full cost of this desired public good of parkland/nature preserve.

209. Thus, by mid-2007, it appeared to Plaintiff that there would be no end to the Town's constant changes to its zoning ordinances, with each change necessitating a total revamping of his site plan maps, of his SEQRA-required studies and of his SDEIS as

well as a back-and-forth dialogue between Plaintiff and his consultants with the Town and its consultants.[8]

210. Specifically, in June of 2007, even the Planning Board's attorney stated that, with the new laws, he could not give an answer about whether additional parklands should be part of the yield calculation. Thus, Plaintiff could not reasonably continue his MareBrook proposal even if he desired to do so, as the Town Attorney was not giving Plaintiff an answer regarding the suggestion that Plaintiff provide additional parkland. Moreover, discussion of this issue could further delay the application's progress for months.

211. It became clear to Plaintiff that the Town was not acting in good faith; but, instead, was seeking to exhaust him financially with no intention of ever granting him a land use approval.

212. Specifically, the Town's recurrent changes in zoning appeared purposefully designed to require Plaintiff to start over whenever he was close to finalizing his site plans and SEQRA work for Planning Board approval. Plaintiff had become financially exhausted.

213. By March 2007, Plaintiff essentially had sunk the following funds into his MareBrook project, in rough numbers:

- $2,700,000 million purchase price;

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[8] Sherman Expenditures: Plaintiff's cost in revising the DEIS and plans for his MareBrook Project from January of 2006 through March 2007 was approximately **$103,837.00**.

- $500,000 plus in ongoing property taxes and municipal assessments; and
- $1,000,000 plus in subdivision and SEQRA work;
- In total, over $4,200,000 (plus several million dollars in interest in loans).

214. Yet, by March 2007, Plaintiff was essentially being told again by the Town to start over.

215. Plaintiff was like Dorothy in the Wizard of Oz, receiving ingenuous promises from the Wizard in the Land of Oz. Not only did he need another yield plan, engineered maps, and a revised DEIS, but the Town attorney did not even know if additional parklands should be part of the yield calculation. Plaintiff could not restart even if he wanted to do so since the Town's attorney could delay things for months.

216. Plaintiff's lenders were clamoring to be repaid. It was becoming impossible for him to find the money to pay his lenders, his consultants, and the Mare-Brook property taxes.

217. Since he had exhausted the funds appropriated for the project and the Town continued to constantly change its rules, Plaintiff had no other choice but to seek help from the courts.

O. May 2008 federal lawsuit

218. In May 2008, Plaintiff commenced a federal lawsuit, *Sherman v. Town of Chester et al*, 08 Civ. 4248.[9]

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[9] This federal lawsuit was voluntarily dismissed on January 6, 2012, and its claims re-filed in this State court within 30 days as permitted by 28 U.S.C. § 1367.

219. After the original complaint herein was filed, Plaintiff was hopeful that the Town would recognize that it had acted improperly and unreasonably toward him; and, then, fairly entertain and approve his MareBrook application.

220. However, discussion with the Town went nowhere.

221. Out of desperation, Plaintiff was able to "partner" with a business entity, whose representative attended a meeting with the Town Attorney, the new Town Supervisor (Mr. Stefan Neuhaus) and others.

222. From his clothing, physical appearance and grooming, the representative obviously was an observant, Orthodox Jew. Plaintiff believes his presence may have fed into the anti-Hassidic bias that affected the Town's decision-making as well as motivated its further wrongfully indifferent and grossly arbitrary actions toward him and his MareBrook project.

223. In November 2008, because talks with the Town were going nowhere, Plaintiff resubmitted his MareBrook application to the Planning Board with the support of his new partner.

224. In December 2008, he then resubmitted his SDEIS and plans for 238 lots to the Planning Board.

225. The Town's response was immediately antagonistic and retaliatory. Upon information and belief, this hostility was because Plaintiff petitioned the courts with a federal lawsuit, combined with the fact that his new financial partner was an Orthodox Jew.

P. December 2008—August 2009

226. In December 2008, Plaintiff resubmitted his SDEIS and plans for 238 lots to the Planning Board.

227. In January 2009, the Town engineer gave Plaintiff a list of corrections to the SDEIS, which included a demand for final designs of the water and sewer plants.

228. At this pre-preliminary approval stage, this was both an impossible requirement and a ridiculous demand. Specifically, the suggestion that Plaintiff should have prepared a set of "final designs of the water and sewer plants" is absurd, as final design for such facilities are never done until things, like location and the number of homes to be serviced, are determined; which, obviously, requires an actual subdivision plan first.

229. The Town engineer's demand for Plaintiff to prepare such a plan was arbitrary and abusive, which would have cost Plaintiff over $100,000 in order to prepare a plan for every revised cluster plan until an actual subdivision was approved by the Town.

230. In addition the Town engineer required analysis of projects located at the other end of the Town, miles from Plaintiff's project.

231. Upon information and belief, the Town engineer's abuse constituted reprisal for Plaintiff's exercise of his First Amendment right to petition his local government (the Planning Board) and the federal courts.

232. In addition, with the Town constantly revising the plans, Plaintiff could have spent more than $500,000 in redesigning plans.

233. Eventually, after 2 years arguing with the new Town engineer, the new Town engineer stated that the water and sewer plans should be submitted after

preliminary approval. The 2003 DEIS that was deemed complete by the engineer in 2003 only included sketch plans and some details of the water and sewer plans.

234. There was no bona fide purpose of demanding full plans. It was demanded solely to burden and oppress Plaintiff Sherman.

235. The Town's engineer eventually relented this contention, in 2011, after over a year of discussion and related billing.

236. The Town engineer also demanded that the DEIS and SDEIS be combined in Spring of 2009, which was not previously requested. As a matter of substance, this was a completely unnecessary demand. The demand appeared designed to a) impose more unnecessary expense upon Plaintiff; and b) create a financial benefit to the Town's consultants.

237. Then, the Town appointed a new Town engineer, effective on May 1, 2009.

238. Before the appointment, Plaintiff raised his concern that the appointment of a new engineer would delay the engineering review of his application. It would also increase the cost (to someone—either the Town or to Plaintiff), since a new engineer would obviously need to "get up to speed" on his MareBrook project, its status, and its history.

239. This act of appointing a new engineer was obviously done intentionally by the Town. Yet, there was no reason that it could not simply continue the services of its prior engineer, Mr. Gerald MacDonald, whom was familiar with his MareBrook project and its other Town-caused iterations.

240. Plaintiffs fear regarding costs became a reality. The Town began to bill Plaintiff for the new Town Engineer becoming familiar with his project and subdivision application.

241. Upon information and belief, Mr. MacDonald's dismissal as Town Engineer was a Town action that may have been taken in reprisal for Plaintiff's petition against the Town for redress (e.g., Plaintiff's federal lawsuit and his petitions to the Planning Board and Town Board) and for Mr. MacDonald's supportive June 6, 2007 letter, which described some of Plaintiffs' petitioning activity and the Town's repeated rezoning as a response.

242. Thus, it appears that Mr. MacDonald may have been retaliated against for supporting Plaintiff's petitions for redress.

243. After the new Town Engineer began his job, the Town billed Plaintiff for this new engineer's review of the entire MareBrook project. It is unreasonable, unjustified, and unauthorized for Plaintiff to be required to pay the Town twice for the same review and familiarization by its new engineer that its former engineer had been paid.

244. Moreover, the new engineer had an entirely new set of questions, concerns and items for Plaintiff to address, almost as if he was operating under a different set of "engineering rules." The Town expected Plaintiff to comply (even though, virtually, all the requests were unreasonable and unjustified and not part of the scope).

245. The Town also billed him for the engineer's "work" that was designed to abuse and oppress Plaintiff.

246. In August 2009, the Town changed its zoning again, eliminating the density bonus for clustering in apparent contradiction of the Town's own Master plan that encouraged clustering.

247. Plaintiff's MareBrook Project appears to be grandfathered, but based upon a history of bad faith, although such may not be the Town's view.

Q. September 2009—May 2010.

248. In September 2009, Plaintiff offered his revised subdivision proposal in two versions—one with 238 lots and another with 227 lots—to the Planning Board. Plaintiff also sought preliminary approval after a public hearing.

249. However, the Planning Board refused to put Plaintiff on its agenda from September through December 2009, denying him his right to a public hearing as well as his First Amendment rights.

250. Specifically, from September until December of 2009, Plaintiff was not allowed to appear before the Planning Board. When Plaintiff challenged the invoicing on or about December 2009 (which was the first time Plaintiff had seen the invoicing), and again thereafter regarding other Town invoicing for its consultants, the Town retaliated against Plaintiff by denying him the right to appear before the Planning Board for several months.

251. This was a further violation of his right to petition government.

252. This was a continuation of Defendant's strategy of obstructing Plaintiff from getting redress from the Town and its agencies, such as the Planning Board.

253. After Plaintiff's resubmission of his application in September 2009, Plaintiff discovered that the Town had replaced the Planning Board Chairman with Don Serotta, whom was openly hostile towards Plaintiff's MareBrook application as he had written letters to the Town in 2001 against his project.

254. Upon information and belief, Mr. Serotta did not have any prior experience on the Planning Board or in land use planning.

255. In the selection of Mr. Serotta and others, the Town filled positions on the Planning Board and Zoning Committee with people whom lived next to MareBrook and whom expressed hostility towards the project.

256. Plaintiff was eventually informed by Mr. Serotta that the reason that he was not allowed to appear before the Planning Board was (allegedly) because he had not paid consultant fees. The Town asserted, on December 4, 2009, that Plaintiff would not be placed upon the Planning Board agenda until he paid $25,000 in consulting fees.

257. However, the Town's rules provide that an applicant is entitled to receive consultant invoices and contest them to the Town Board within 15 days of receipt.

258. Plaintiff requested these invoices, but was not provided with them until February 2010. Although he questioned the invoices of the consultants, Plaintiff could not speak to the Planning Board directly about his concerns until he paid them the amount that these invoices reflected.

259. In this regard, the Town Code states, as to reimbursement of consultant's fees, as follows:

"**§ 48-3. Reimbursement of costs and expenses; escrow account; vouchers.**

A. The applicant for approval of any land use or land development proposal shall reimburse the Town for all of the Town's reasonable and necessary engineering, legal and planning fees and expenses incurred by the Town in connection with the review and/or approval of the application. Said fees and expenses are deemed application fees. Reimbursement shall be made in accordance with this article. For the purposes of this article, the term "land use or development" shall include, but not be limited to, a subdivision, lot line change, site plan, special permit, wetlands permit, variance, interpretation, appeal to the Zoning Board of Appeals, or any modification or amendment of any of the foregoing, and compliance with the State Environmental Quality Review Act (SEQR).

B. Initial planning and zoning review escrow deposits pursuant to the fee schedule established by this article shall be delivered to the Town Clerk as part of the original application submission.

C. No review shall be undertaken by the consultants, nor shall the matter be scheduled before the Planning Board, Zoning Board or Town Board until the initial escrow deposit, as set forth in this article or the incorporated fee schedule, is paid."

260. Noteworthy, the Town code references SEQRA regulation § 617, which provides that the applicant can still appear before the Planning Board if he or she is contesting such fees. Plaintiff was not allowed

to communicate with this governmental entity (the Planning Board) and exercise his First Amendment rights until he first paid the disputed and apparently unjustified fees.

261. Although he did not consider these fees to be fair or "roughly proportionate" to the Town's legitimate needs, Plaintiff paid the consultants fees of purportedly $25,000 in March of 2010 in order to communicate with and make requests of the Planning Board.

262. It was after the filing of an Amended Complaint in federal courts, on May 25, 2010 that Plaintiff was barred from returning or addressing the Town's Planning Board about these fees. A motivation appears to be reprisal for petitioning the federal court.

263. Plaintiff only was permitted to attend a workshop meeting before the Planning Board in April 2010. During this meeting, after a year of demanding full-blown designs for a MareBrook water plant and sewer plant, the Town engineer finally agreed that the water and sewer plant designs only were needed after preliminary approval.

264. Sherman Expenditures: For the period of August 2009 to April 2010, Plaintiff spent approximately $75,000.

265. After Plaintiff filed his federal lawsuit, the Town continued to act in bad faith and with the intent to obstruct.

266. However, instead of engaging in zoning changes as a means of obstruction., the Town obstructed Plaintiff bureaucratically by hiring new "technical" personnel (a traffic engineer and architect

on November 17, 2010 and a new planner in December 2010) who, as detailed below, then required new and unnecessary submissions and payment for duplicate review work, after the Town deemed the Draft Environmental Impact Statement Complete, on November 17, 2010.

267. As far as housing configuration, his current MareBrook application is not much different than what Plaintiff proposed in 2000, other than the missing recreational facilities. In fact, the homes of the new plan occupy more open space than the MareBrook proposal of 2003.

268. Significantly, the current proposal is much more "conventional" than his prior versions. It is a "by right" application—that is, the lot sizes comply with the "by right" provisions of the current zoning code.

269. Nevertheless, the Town obstructed in the following ways.

270. First, at the May 2010 meeting, the chairman of the Planning Board told the Town consultants to not give him anything in writing.

271. Second, after Plaintiff submitted his revised DEIS on June 1, 2010, the Chairman demanded an additional cluster plan for the conventional lots where the PAC was to be in the June 16, 2010 meeting. Consequently, this would require a reworking of his DEIS, engineering, and plans again.

272. Third, on September 1, 2010, the Planning Board voted to accept the DEIS as complete, and scheduled a public hearing for November 17, 2010 (where a traffic consultant and landscape architect showed up on behalf of the Town for the first time).

273. On December 14, 2010, the Town replaced Garling Associates with Ted Fink as the Town's planner. Mr. Fink then requested an additional traffic study regarding traffic on the other side of town (which Plaintiff and his consultants had long before completed, which had already been accepted and deemed complete by the Planning Board). Plaintiff and his consultants also submitted a draft Final Environmental Impact Statement (DFEIS).

274. At the January 5, 2011 Planning Board meeting, the new planner wanted to revise lot sizes and locations even though they had a 62 page set of plans that was already deemed complete by the Town. The new planner, however, demanded an environmental map, which took another month to complete at a cost of $8,000. Plaintiff and his consultants continued to receive new monthly lists from Mr. Fink, the new Town Planner, including demands for a wetland study, concerned species study, and constraints study (for which no changes were found in any of these studies that were completed in 2003). These studies were unnecessary and cost another $30,000 to $50,000. These studies had been deemed complete and acceptable 6 months earlier when the DEIS was deemed complete.

275. Mr. Fink also prepared a new list in May of 2011, requiring Plaintiff to redo the deemed complete DEIS and incorporate unnecessary material into the FEIS. This was work that had already been done and deemed complete. Thus, its completion unnecessarily increased Plaintiff's costs, which totaled over $260,000.

276. In July 2011, the Planning Board Chairman canceled Plaintiff's appearance at the Planning

Board's monthly meeting and demanded $40,000 in consultant fees before he could return.

277. On July 11, 2011, Plaintiff received an e-mail from Planning Board Chairman Serotta, stating that all roads had to be 24 feet wide instead of 30 feet, after the deemed complete action in November of 2010.

278. Once again, Plaintiff had to redraw new plans in order to relocate curbs, drainage, water and sewer mains, grading, etc., as well as modify the disturbance areas and related engineering. No explanation of these fees has yet been provided, and Plaintiff has lost 4 more months thereby to act.

279. In sum, for each of the sequential land use law changes, Plaintiff was required to address all regulatory changes relevant to his proposal, including reconfiguring lots, revising environmental analyses and impact statements, relocating water mains, sewer mains, roadways, and preparing new maps and plans, all at a cumulative cost that Plaintiff estimates exceeded half of a million dollars.

280. Since his DEIS resubmission in 2008, Plaintiff has expended over $350,000, and has spent over $60,000 in fees to the new planning consultant (Fink) when the old consultant (Darling Associates) only cost $20,000 to review the DEIS in 2003 and 2010.

281. The Town's regulatory land use controls, summarized above, were not for the purpose of legitimate land use regulation, but rather were designed to prevent Plaintiff from being able to use or develop his land.

282. Essentially, after over 10 years of effort, the Town has forced Plaintiff to modify his project from a

very attractive proposal of housing surrounding a golf course and other recreational facilities (fully consistent with the spirit and intent of the Town's 1974 and 2003 Master plans) to the present proposal of essentially conventional housing, for reasons that appear improper and discriminatory.

283. Upon information and belief, by refusing to consider Plaintiff's PAC request, the Town was violating its own policy, including favoring housing for semi-retired and retired families.

284. The Town's refusal to properly prepare its own EIS regarding its zoning law changes indicates its disregard for actually examining environmental issues and reveals that its true intent was singular—to stop Plaintiff from reasonably developing and using his MareBrook property.

285. By constantly changing the regulatory rules, the Town's strategy was to turn MareBrook into a *de facto* nature preserve without compensating Plaintiff.

S. Plaintiff's Article 78 Proceeding—November 10, 2011

286. To contest the Town's requirement that Plaintiff pay its unjustified consultant fees before entertaining his administrative appeal and moving forward on his MareBrook project, Plaintiff commenced a CPLR Article 78 Proceeding on November 10, 2011.

287. During this time, for a total of 11 months, Plaintiff was not allowed to appear before the Planning Board.

288. In addition, from December 2009 through October 2011, Plaintiff paid approximately $89,000

to the Town, as demanded, for its unreasonable consultant fees.

289. As a result, from December 2010 to October 2011, it cost Plaintiff approximately $446,000 due to the Town's abusive, arbitrary, unnecessarily expensive, consultant-directed process, which required Plaintiff to redo his formerly "deemed complete" DEIS (including maps) and to undertake other unnecessary actions, such as responding to every letter/comment the public made in connection with Plaintiff's November 2010 DEIS hearing.

T. Town's demands regarding FEIS illustrate abuse

290. The Defendant Town has acted arbitrarily and abusively regarding Plaintiff's EISs from 2000 through the present (January 2012).

291. Most recently, the Town has intentionally created obstacles to purposefully delay its processing of Plaintiff's Final Environmental Impact Statement ("FEIS") regarding his MareBrook application.

292. A hearing on the draft environmental impact statement ("DEIS") was conducted in November 2010. Therefore, a final EIS should and could have been ready for Town Planning Board review a short time thereafter.

293. Instead, the Planning Board insisted that Plaintiff essentially redo his entire DEIS, which had already been deemed complete previously.

294. The Planning Board also insisted that Plaintiff respond to unnecessary, trivial and often times patently absurd questions, for no justifiable environmental purpose and, apparently, solely to delay the project.

295. Examples of responses demanded by the Planning Board (and in particular by its Town Board-appointed planning consultant) include:

a) Determination of stream flow of a stream on Plaintiff's property (without specification of any issue of environmental concern);

b) Evaluation of a traffic intersection in the Town of Monroe, miles away;

c) Details of a wetlands walking trail crossing, which did not cross any wetlands;

d) Creation of a capital fund for water and sewer improvements, which is not Plaintiffs obligation;

e) Creation of a seed escrow account, which is not Plaintiff's obligation;

f) Analysis of water supply system maps, plans, and operating expenses, if the Town was to operate the water supply system (not Plaintiff's proposal);

g) Demands by the Town Planner for letters from the DEC and Wildlife Division before preliminary approval (which letters these agencies cannot provide since the MareBrook plans are constantly changing prior to preliminary approval);

h) Preparation of schematics for MareBrook to connect to the Harriman sewer plant, although MareBrook will have its own sewer plant upon approval by the Planning Board;

i) Studies of the feasibility of the proposed Tetz sewer plant on the other side of Town.

j) Separate answers to all inquiries by local residents after the hearing on Plaintiffs draft EIS, even if the questions were unrelated to any issue of environmental concern or already answered in his DEIS or draft FEIS.

This included answering every point in every letter, sometimes requiring an answer to be repeated 20 to 40 times, since quoting a previous answer was not allowed by the Planning Board (as directed by the Town's consultants). Some illustrative questions are as follows:

i. *Resident*: Will new homes find buyers?

ii. *Resident*: Will lots stay vacant?

iii. *Resident*: Drainage at Bull & Dug road, which is before the site?

iv. *Resident*: How will future actions by the Governor affect school taxes?

v. *Resident*: Who will police the snowmobiles and ATV's in the Goose Pond Park?

vi. *Resident*: allow dead trees to remain and replace lawns with multi-layered landscapes.

vii. *Resident*: If my well runs dry will town put in a new one?

viii. *Resident*: What happens to our property value if a new home is foreclosed?

ix. *Resident*: Safety of people entering the Goosepond Park entrance which is 2 miles from the site.

x. *Resident*: We don't like the billing times of the existing water company, how will it be fixed?

xi. *Resident*: Is the Town qualified to inspect the construction?

xii. *Resident*: What are the salaries and benefits of the municipal employees who will oversee the construction?

xiii. *Resident*: What style of homes will be built?

xiv. *Resident*: Will our mailing addresses change in Walton Lake Estates?

xv. *Resident*: Will the project use water from the Monroe Lake (miles away)

296. Plaintiff paid over $280,000, to date, to meet the Town's "requirements" regarding the FEIS. If he had not complied with the Town's demands, the Planning Board would not have proceeded further with his application. As a result, Plaintiff's only option would be to sue, with the project stopped, which would accomplish nothing for Plaintiff

297. In sum, the Town's demands, regarding finalization of the FEIS, were arbitrary, irrational, and unnecessary, unsupported by any requirement of the state environmental law (SEQRA) and designed to burden, delay and obstruct Plaintiff's MareBrook application.

Malicious and unlawful Town motivations

298. The Town decided, for reasons still not totally clear, that it would prefer to stifle and obstruct Plaintiff's MareBrook application, in order to prevent its use and development of MareBrook. It did so in callous disregard to the potential personal consequences to Plaintiff such as foreclosure and bankruptcy.

299. The Town's strategy was and is, essentially, to turn Plaintiffs land into a *de facto* nature preserve, which adjoins a state park, without paying Plaintiff any compensation for this taking of Plaintiff's property.

300. As a result of the Town's actions, Plaintiff has been:

a) Unable, for over a decade, to receive a preliminary approval on his initial subdivision application, or on any modifications, portions or changed re-submissions thereof;

b) denied the ability to apply for a minor subdivision;

c) denied a preliminary approval, which he should have received as of right in December 2003;

d) denied the ability to seek an administrative remedy (e.g., through the Town's Zoning Board of Appeals) because the Town consistently avoided rendering a final decision on Plaintiff's applications; and

e) denied the ability to seek a judicial remedy (e.g., through an Article 78 proceeding[10]) because the Town's tactic of repeated re-zonings prevented the Planning Board from issuing a decision on Plaintiff's land use application as Plaintiff was forced to devote time and finan-

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[10] Plaintiff alleged in his federal action, filed May 5, 2008, that the Town's tactic of repeatedly changing its zoning code has the effect of depriving him of all use and enjoyment and ownership interest in his real property.

cial resources to revising and changing his application to conform to the new zoning laws (of 2003, 2004, 2005, 2006 and 2007, and perhaps 2009).

301. As described above, the Defendant Town's actions, and that of its representatives, have prevented Plaintiff from realizing any return on his investment in MareBrook.

302. Plaintiff has been denied any and all economically viable use, enjoyment or sale of his real property through the Town's unreasonable and unjustified regulatory actions.

V. No "reviewable" municipality decisions

303. By constantly changing the subdivision approval criteria, Defendant Town avoided the issuance of any "final decision" on Plaintiff's MareBrook Project applications, thereby denying Plaintiff the ability to appeal to the Town's Zoning Board of Appeals or to State courts through a CPLR Article 78 proceeding or declaratory action about the Planning Board's disapproval.

304. This appears to be a calculated tactic by the Town, done under the belief that if it never gave Plaintiff the opportunity to make a challenge or appeal, that it could get away with obstructing his project.

305. It is unlikely that any local citizen is objecting to the Town stifling Plaintiff's progress because as long as Plaintiff cannot develop his land, the land remains unused and a park-like *de facto* nature preserve. However, if the townspeople wish to have a nature preserve, then the Town should purchase his property at a fair price. Otherwise, the Town has

no right to deny his right to use, reasonably develop and/or sell his land.

306. By never taking an "action," Plaintiff could not seek Article 78 relief regarding the obstruction of his subdivision application, and Plaintiff was been relegated to pursuing his rights under 42 U.S.C. § 1983, for which this State court has concurrent jurisdiction with the federal courts.

W. Evidence of anti-Semitic fear and animosity

307. The reckless indifference, disdain, intentional arbitrariness, non-transparency, and misrepresentations (affirmative or through silence, such as Garling Associates' silence towards Plaintiff while working on Town Board zone changes) strongly suggest that the Town's leadership has malicious and unlawful motives guiding its unreasonable conduct.

308. This motive, Plaintiff believes, is Town officials' (and their voting constituency's) fear that Plaintiff's 398 acre parcel could be transformed into another Hassidic Village, such as the Village of Kiryas Joel, located in walking distance from his MareBrook property.

309. Plaintiff is Jewish, born of Jewish parents and brought up with a Jewish heritage. Plaintiff practices the religion as a conservative. He is not ultra-Orthodox or Hassidic

310. At all relative times, his religious faith was known to some or all of the municipal Defendants, including the fact that he had a business and financing arrangement with a well-known developer, Mr. Israel Herskowitz, whom has developed land and built housing for Orthodox and Hassidic Jewish communities.

311. As a developer, many of his business dealings are with Jews. The Town's present and former supervisors and Town attorneys were aware of this.

312. As mentioned above, Plaintiff brought a representative of a potential investor with him to a meeting with Town officials. By his attire, it was clear to see that the representative is an Orthodox Jew.

313. In addition, Plaintiff has also found his MareBrook model home vandalized with a spray-painted, Nazi swastika.

314. It can be inferred from the facts that the Town was motivated to obstruct him because of anti-Semitism and the fear that his land may be used to incorporate a Jewish community.

315. Specifically, there is substantial circumstantial evidence that there was fear in the Town of Chester, and its elected officials, that a Kiryas Joel-style village might spring up out of the residential subdivision approval of his substantially-sized parcel of land.

316. Upon information and belief, the available evidence supports the reasonable inference that the Town's action and inaction regarding the MareBrook proposal is the result of anti-Semitism or fear of the installation of an Hasidic Jewish community.

317. The ultra-Orthodox, Hassidic Jewish village of Kiryas Joel is in walking distance (6 miles away); and has been, for quite some time, a source of angst among residents of neighboring municipalities.

318. Jewish municipalities, such as Kiryas Joel, in Orange County and Rockland County have caused concern for residents of these counties for many

reasons related to the ultra-Orthodox Jewish life-style and culture.

319. Plaintiffs observation is that in the suburbs of New York, many non-Jewish citizens appear very uncomfortable with, and even frightened by, the Hassidic culture and lifestyle.

320. It is common to hear comments that the ultra-Orthodox and Hassidic practice of having six or more children per couple will create burdens for the larger community; and articles about the Village of Kiryas Joel are often found in the newspapers, including articles about court cases involving the community's use (or abuse) of governmental services and municipal and school tax burdens.

321. In casual discussion, and at a Town Board meeting for a subdivision dubbed "Camp Monroe" adjoining his MareBrook project, Plaintiff heard local people express fear that allowing a subdivision approval with a sufficient number of houses could result in the sale to a number of Jews, such as the Hassidim, whom could then incorporate a village like Kiryas Joel (commonly referred to as the "KJ").

322. Upon information and belief, unlawful discrimination can be inferred from the Town's irregular regulatory activities affecting his property. This irregular Town action includes, but is not limited to:

- The Town's disregard for proper land-use policies (including the policies stated in its own land-use Master plan);
- Its singling out of his proposal for adverse treatment

- Its use of a secretive "Zoning Committee" without agenda, minutes, or notice of meetings;
- Its refusal to accept a "minor" (small parcel) subdivision application that he filed in December 2001, which were allowed under the terms of the Town's Moratorium;
- Its constant changing of land-use laws, rules, and regulations relevant to his property;
- Its undertaking of major zoning changes without first preparing and considering a Town-prepared EIS; and
- Its use of new consultants to repeat and redo a final DEIS, billing of Plaintiff for repetitive consultant work and refusal to allow Plaintiff to attend Planning Board meetings delaying the application more than 12 months in the last 2 years alone.

323. The above reflects improper hostility and animosity toward Plaintiff and his MareBrook Project.

324. Upon information and belief, it can be reasonably inferred that the Town and its land-use leaders harbored anti-Semitic biases and animosities regarding his MareBrook Project, including their fears that the ultra-Orthodox or Hassidic Jews might transform the proposed subdivision into "another KJ."

325. The record is clear that Plaintiff has been inordinately and unreasonably delayed as well as prevented from receiving subdivision approvals for the residential use of his property.

326. From the above, a reasonable fact-finder can infer illicit motivation for denying him the right to develop his real property.

X. Class of one

327. While Plaintiff was constantly stopped from developing his property, the Town previously approved large projects without hassle, numerous zoning changes, or new consultants.

328. For example, the following projects by other developers were approved:

- Windridge (approximately 240 homes clustered on 240 acres, or 1 per acre);
- Lake Hill Farms (approximately 150 homes clustered on 150 acres, or 1 per acre);
- The Greens of Chester (approximately 600 homes on a multi home site), for which the Planning Board has graciously accommodated for over 10 years;
- Surrey Meadows (approximately 200 homes);
- Lake Region Estates (over 100 homes); and
- Walton Lake Estate (over 100 homes).

329. Due to the Town's deliberate stalling of his MareBrook project, Plaintiff is asserting his vested right for a default approval.

330. Plaintiff requests that he be granted a default approval of this proposal as it existed in October 2003.

331. The costs from the beginning of the project (other than land purchase costs) through the DEIS/application being "deemed complete" by the

Planning Board in October 2003 were approximately $684,869.

332. Plaintiff would not have expended this huge sum had the Town's officials not led him to believe that it liked and would approve his MareBrook proposal. The above $684,869 includes some infrastructure (installation of wetland fencing) as well as the cost of his project's "model home."

333. Upon information and belief, the Town's regulatory land use controls summarized throughout this complaint were not for the purpose of legitimate land use regulation, but rather were designed to prevent him from being able to use or develop his land.

Y. Secret "final decision" of Town to obstruct Plaintiff indefinitely is ripe for judicial review

334. The Town has formulated and implemented an unannounced policy to obstruct and delay Plaintiff's MareBrook subdivision application in order to prevent Plaintiff from using and developing his land.

335. New York State law, upon information and belief, does not provide a compensation remedy for a regulatory taking such as that involved in this case, based upon current New York State Court of Appeals case law.

336. For example, Plaintiff has no remedy under the EDPL (because as a private citizen he cannot act as a condemnor).

337. Rather, Plaintiff's remedy in State court is through federal constitutional law and 42 U.S.C. § 1983.

338. Nevertheless, to the extent that there is a New York State remedy for the Defendant Town's regula-

tory taking of Plaintiffs real property, Plaintiffs seek such relief herein.

339. Accordingly, on October 4, 2011, Plaintiff filed a notice of claim with the Town; and was examined on this claim on November 30, 2011.

340. Defendant's intention to deprive Plaintiff of his property has never been expressly stated, nor has its intention to take his property as a *de facto* nature preserve without paying for such. Thus, the evidence supporting such intention is inferential; and it was not until mid-2011, and the Planning Board refusal to allow Plaintiff to appear even to dispute unjustifiable consultant fees, as well as with Defendant's abusive demands in the summer and fall of 2011 regarding Plaintiffs FEIS, that it became apparent to Plaintiff that the Town's intention was and is to permanently deprive Plaintiff of the use, development and profitable enjoyment of his property and of his labors.

341. Defendants' actions involve a municipal policy, pattern and practice to deny Plaintiff his constitutional rights, thereby entitling Plaintiff to damages relief under 42 U.S.C. § 1983.

Summary of Town's Regulatory Abuse

342. The Defendant Town imposed a Moratorium in 2001, with extensions beyond the legally allowed time period.

343. It enacted a new Master Plan in 2003, but, upon information and belief, did not prepare an environmental impact statement or generic environmental impact statement before doing so.

344. The Defendant Town revised its zoning code effective around December 24, 2003, which revisions

in large measure singled out Plaintiff's subdivision application for adverse treatment. This was done without informing Plaintiff of the pending re-zoning or "grandfathering" of Plaintiff's pending Planning Board application. The Town prepared no EIS before this enactment.

345. The Defendant Town nullified Plaintiff's subdivision application work performed prior to December 24, 2003, by failing to provide Plaintiff with a required hearing on his request for preliminary subdivision approval within 62 days after having accepted the application and deeming his DEIS "complete" (in mid-October 2003, although the deemed complete DEIS included conforming to the new 2003 master plan of the Town).

346. The Defendant Town, through its consultants (e.g., Garling Associates), misled Plaintiff into believing that Plaintiff would be granted subdivision approval after satisfying the requirements of the December 2003 zoning code, thereby dissuading Plaintiff from seeking legal redress at that time (for example, seeking the "default approval" of his application, to which he was entitled as a matter of right under N.Y.S. law[11]).

347. The Defendant Town secretly sabotaged Plaintiff's application, by drafting further amendments to the Town's land use regulations, thereby legislatively

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[11] See, Town Law § 276 (8). Plaintiff subsequently, after the federal action was commenced, requested that the Town Clerk issue a default approval, but has yet to receive a response (or a refusal) from the Town Clerk. Thus, no limitations period has begun on this point.

changing the Town's land use regulations again in 2004, to Plaintiffs substantial prejudice. These amendments were enacted in June 2004 (shortly before Plaintiff had reasonably expected to receive Planning Board preliminary approval. During this time, the Town's consultants, who were rewriting the zoning laws, were advising Plaintiff how to proceed forward with his application, without informing him of the proposed zoning amendments.

348. The Defendant Town repeated the above abusive tactics several times, such as tasking its planner, Garling Associates, to ascertain how Plaintiff's MareBrook application was proceeding, so that the Town could (without notice to Plaintiff) hinder and obstruct Plaintiff by:

- legislatively changing the Town's land use regulations again in 2005, to Plaintiffs substantial prejudice;
- failing to act in around the spring/summer of 2005, through its Town Board, on Plaintiffs request to be permitted to use a Town "collector road" or county road for access to the portion of the proposed MareBrook subdivision which contained the PAC;
- failing to act in the spring/summer of 2005, through its Town Board, on Plaintiff's request, related through the Planning Board's approval and recommendation, that Plaintiff's PAC and clustering proposals be accepted by the Town Board;
- legislatively changing the Town's land use regulations again in 2006, to Plaintiff's substantial prejudice;

- legislatively changing the Town's land use regulations again in 2007, to Plaintiff's substantial prejudice; and
- legislatively changing the Town's land use regulations again in 2009, potentially to Plaintiffs substantial prejudice.

349. As to the above land use law changes, the Town prepared no EIS, generic EIS, or supplemental EIS before this enactment.

350. The Defendant Town imposed unnecessary, duplicate and absurd administrative requirements upon Plaintiff in 2009, 2010 and 2011, all to Plaintiffs substantial prejudice, including requiring Plaintiff to:

- redo his project's Draft EIS ("DEIS") after it had previously been deemed complete;
- unnecessarily redo, revise and update various reports, investigations and engineering by Plaintiffs consultants from March through November of 2011, which are still ongoing; and
- pay fees for unnecessary, unauthorized excessive and duplicative work by Town consultants without a reasonable means for redress or appeal (which issue is still ongoing in an Article 78 Petition filed in November 2011, Orange County Index No. 010376/2011).

351. The above conduct by the Town has deprived Plaintiff of all use and enjoyment of his land for the period 2001 to present, including, but not limited to, destroying his ability to sell portions of his residentially-zoned property for residential housing, or to

otherwise subdivide or use his real MareBrook property, by preventing him from subdividing the property in any manner.

352. The Town's actions have also deprived Plaintiff of his labors and work as a developer and, thus, his liberty interest in his occupation as a developer or real property, in violation of his due process rights.

353. When Plaintiff purchased his MareBrook property in 2001, he reasonably believed and reasonably expected that he would be able to obtain subdivision approval for his MareBrook project.

354. Thereafter, Plaintiff continued to reasonably believe and expect that his initial investment of $2,700,000, and his additional investment of time and over $2,000,000 in money in pursuit of a subdivision approval, was not time and money wasted.

355. Plaintiff purchased MareBrook in order to create a reasonable residential development with pleasant and environmentally sound recreational facilities, including a golf course.

356. Based upon the state of affairs as they existed on and after 2000, there was no economically viable use for Plaintiff's land as it was zoned, except residential development such as that proposed by Plaintiff, either with or without the recreational amenities.

357. Upon information and belief, from a historical point of view, the MareBrook land was formerly agricultural. However, it has not been used for any agricultural use in recent times; and farming is not a viable economic use for real property in this region of New York State, and this area of Orange County.

358. The Town's zoning of the MareBrook land, at of the date of Plaintiff s purchase, was for less intensive land use than commercial or industrial use.

359. There were no residential or commercial structures or business activities located upon Plaintiff's land, or any agricultural or any other profit-making activity at the time of Plaintiffs purchase; and, therefore, no means available for Plaintiff to productively use his land to produce income or otherwise use his land for financial gain.

360. Between the period of 2000 and present (January 2012), Plaintiff spent the following roughly approximate amounts of money (as well as his corresponding amount of personal time):

a) $2,700,000 for the purchase of the MareBrook property in 2000-2001;

b) followed by approximately $684,000 spent for the planning, engineering, design, environmental and other technical services in responding to the Town's 2001 zoning moratorium; and, thereafter, working further on the application and final presentation of a "deemed complete" application to the Town's Planning Board in October 2003;

c) followed by approximately $117,000 spent for planning, engineering, design, environmental and other technical services work performed in responding to the Town's new December 24, 2003 zoning ordinance;

d) followed by approximately $130,000 spent for planning, engineering, design, environmental and other technical services

work performed in responding to the Town's new June 2004 zoning ordinance;

e) followed by approximately $111,000 spent for planning, engineering, design, environmental and other technical services work performed in responding to the Town's new July 2005 zoning ordinance;

f) followed by approximately $103,000 spent for planning, engineering, design, environmental and other technical services work performed in responding to the Town's new February 2006 zoning ordinance;

g) followed by approximately $122,000 spent for planning, engineering, design, environmental and other technical services work performed in responding to the Town's new March 2007 zoning ordinance;

h) followed by Plaintiffs federal lawsuit in 2008, seeking a remedy for the Town's regulatory abuse of Plaintiff's rights through its above-mentioned rezoning (and other regulatory abuse); and

i) followed by approximately $388,000 spent in resuming his application in 2008, which expenses were increased greatly due to the Town's regulatory abuse in 2009-2011 in the form of creating unreasonable and unjustified "technical" and administrative obstacles delaying the processing of Plaintiff's MareBrook application (e.g., requiring "final" drawings and plans for a water plant and sewer treatment facility, which request

was absurd at the preliminary subdivision approval stage); as well as

j) prohibiting Plaintiff from appearing before the Planning Board for a period of 7 months without a stated or justified reason; and

k) billing Plaintiff for over $80,000 in unjustified, unauthorized and duplicative consultant fees for work allegedly performed by the Town's consultants.[12]

Z. Damages

361. Plaintiff has not been allowed to productively use or develop his property during the whole application process for over 10 years.

362. As a consequence of the Town's abuse of its regulatory powers, through the enactment of sequential zoning laws, and its administration of the Planning Board process through unreasonable technical requirements, wrongful financial exactions and undue and unjustified delays, the Town has financially exhausted Plaintiff, to the point of facing foreclosure and possible personal bankruptcy. Plaintiff has lost almost his life-long savings in seeking to reasonably use and develop his MareBrook land.

363. As a result of the Town's obstruction of Plaintiff's attempts to use and develop his real estate, Plaintiff has been the subject of foreclosure proceedings. Due to economic necessity, Plaintiff has been

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[12] This consultant fee issue is the subject of an Article 78 petition pending in this court. *See*, Matter of Sherman, Index # 010376/2011 (Orange Sup. Ct.)(Woods, J., A.J.S.C.).

forced to contract away the majority of his economic interest in MareBrook to lenders and investment partners; and one of his lenders, TD Bank, has obtained a personal judgment against Plaintiff in the sum of $4 million. Collection action against Plaintiffs personal assets is an obvious possibility.

364. Plaintiff has lost 80% or more of his equity and ownership share of MareBrook to bring in investors.

365. Plaintiff has lost two contracts for the sale of the property (sale of existing tax lots), which has caused him great financial damage and loss in profit.

366. Plaintiff was been damaged by being required to pay the Town's consultants, especially its engineers, for unnecessary work; the predominant portion of which would have been unnecessary absent the unlawful motivations and actions of the Defendants herein.

367. A summary of Plaintiffs costs is reproduced below:

- Cumulative Taxes paid (through 2010): $700,000
- Cumulative Interest Charges & Carrying Costs: $3,000,000
- Yearly Expenses: $1,872,000
- Original Purchasing Price: $2,700,000
- Total Cost: $8,272,000

368. Thus, Plaintiff has lost most of his financial investment in MareBrook.

369. Defendants' actions have also deprived Plaintiff of his liberty interest in pursuing his livelihood as a developer.

370. Thus, Plaintiff has been severely damaged by the Town's unlawful and abusive actions herein.

FIRST CAUSE OF ACTION— DENIAL OF, AND REPRISAL FOR EXERCISING, PLAINTIFF'S FIRST AMENDMENT RIGHTS, INCLUDING RIGHT TO PETITION, AND FREEDOM OF RELIGION

(U.S. Constit., amend I)

371. Plaintiff hereby repeats and realleges each allegation contained in the paragraphs above as if fully set forth again here at length.

A. Religion & Association

372. Upon information and belief, Plaintiff's Jewish religion, his association with Jewish businessmen and lenders, and the fear and perception that Plaintiff may sell MareBrook housing to Jews (and perhaps ultra-Orthodox or Hasidic Jews), resulted in the unlawful and discriminatory actions obstructing Plaintiff's MareBrook Project described in this complaint, and reprisal for Plaintiff's business affiliation and potential sale of real estate to people of the Jewish faith, including but not limited to Orthodox or Hasidic Jews.

373. Plaintiffs right to exercise his religion, and to associate with people who are Orthodox or Hasidic Jews, and to potentially sell land or housing to such individuals, has been infringed.

B. Denial of right to petition

374. The First Amendment guarantees the right to petition government for the redress of wrongs.

375. Plaintiff has sought to petition the Defendant Town for the redress of wrongs regarding his Mare-Brook application, but has been denied such right to petition.

376. Upon information and belief, the "right to petition" can be viewed as the reciprocal to procedural due process. Due process requires giving notice to a person and an opportunity to be heard, thereby hopefully avoiding the creation of a grievance.

377. The right to petition involves the citizen to provide notice to the government of a deprivation or grievance, and to seek the government's redress.

378. Here, the Town did not provide Plaintiff with notice of its motivations and intention to obstruct his land use applications to it, thus depriving Plaintiff of due process (Third Cause of Action). As a consequence, the Town created a deprivation and grievance for which Plaintiff was entitled to seek redress, from the Town, under the right to petition guarantee of the First Amendment.

379. Land use applications are a form of petition to government.

380. The Defendant Town has refused to receive and consider Plaintiff's petitions to the Town (his MareBrook application, in its evolving forms).

381. Upon information and belief, Plaintiffs land use applications were not considered by the Town because it kept changing its zoning ordinances to avoid the need to address the merits of Plaintiffs land use applications.

382. Another form of petition is simply being allowed to address a Town agency—such as the Plan-

ning Board—regarding matters pending before such a body.

383. In this regard, Plaintiff sought for many months, during 2009, 2010, and 2011, to be allowed on the Planning Board agenda so that he could be heard and have his subdivision application considered. The Planning Board has refused to allow him on its agenda, or appear otherwise.

384. It has done so arbitrarily and in violation of law, upon the purported grounds that Plaintiff must pay Town consultant fees, even though such fees are in dispute. Thus, the Town, through its Planning Board, has denied Plaintiff his right to petition.

385. Finally, Plaintiff exercised his right to petition by commencing litigation against the Town in 2002, regarding the moratorium, and in federal court in 2008, and with an amended complaint in 2010, regarding the regulatory abuse and constant rezoning described herein.

386. As a result of his petitions to the courts, Plaintiff suffered reprisal.

387. Plaintiff will be further denied the right to petition if this Court does not provide a remedy for the governmental action described herein, which has prevented Plaintiff from using, developing and selling his real property; taken his labor as a developer; and has ruined Plaintiff financially.

388. Plaintiff has been injured thereby.

389. This claim is actionable under 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION— REGULATORY TAKING OF PLAINTIFF'S REAL PROPERTY, AND DENIAL OF HIS PROPERTY INTEREST IN USING, ENJOYING AND SELLING HIS REAL PROPERTY

(U.S. Constit., amends. V, XIV)

365. Plaintiff hereby repeats and re-alleges each allegation contained in the paragraphs above as if fully set forth again here at length.

A. No Rational Basis for Towns Regulatory Actions

366. The Town's techniques and methods of land use regulation, including constant rezoning and land use enactments (which do not substantially support the Town's master plan), and the Town's arbitrary and capricious administrative requirements imposed by financially self-interested consultants, constitute irrational regulation, which does not support a valid public purpose.

367. The Defendant Town's 2001 land use moratorium, and subsequent changes to the Town's zoning and land use laws, regulations and the Town's interpretations thereof, were not designed to, and did not, substantially advance legitimate State or Town interests, and lack rational basis.

368. In fact, Defendant's zoning changes, upon information and belief, run against the master plan and comprehensive plans.

i. "Reverse Spot Zoning" & Town's ignoring SEQRA

369. Moreover, regulatory actions taken to prevent residential development in an area zoned for residential development, in order to maintain a a *de facto*

nature preserve, constitute "reverse spot zoning" and, for this additional reason, are irrational governmental action.

370. The zoning actions of Defendants were intentionally directed at Plaintiff to single him out and to discriminate against his MareBrook Project subdivision proposal.

371. Defendant's actions constituted unlawful "reverse spot zoning" as they were designed to impermissibly prevent Plaintiff's legitimate and reasonable proposed use and development of his MareBrook land (which proposed use was fully in conformity with the 1974 and 2003 Master Plans) and, by implementing zoning there under, to create a *de facto* "nature preserve zone" limited to Plaintiffs MareBrook land.

372. The Town was required to prepare its own EIS (generic, supplemental or otherwise) when its revised land use ordinance(s) had the potential for significantly affecting the environment, but failed to do so.

B. Per Se Regulatory Taking of Plaintiff's Property, by Denying All Use and Benefit

373. The Town's actions herein have deprived Plaintiff of all use and enjoyment of his real property, including, but not limited to, the right to develop and sell any portion of such property; thus constituting a *per se* regulatory taking of Plaintiffs property.

374. The Town's actions in denying Plaintiff of all use, enjoyment and benefit of his real property amounts to a categorical taking of Plaintiffs real property by the Town.

C. Penn Central Balancing

375. The Town's regulatory actions taken herein, to the present, are supported by little, if any, valid public purpose, whereas the burden imposed upon Plaintiff has been oppressive and devastating; thus constituting a regulatory taking of his property without just compensation under the teachings of the US Supreme Court in *Penn Central. See, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).*

376. The Town's land use law changes were not of environmental significance, as indicated by the Town's own declarations of environmental non-significance, in the form of Negative Declarations ("NegDec's) under SEQRA.

377. The Town's land use law changes were then used by the Town to impose oppressive regulatory burdens upon Plaintiff, preventing him from using, developing and enjoying his property and destroying him financially.

378. In balancing the Town's legitimate (minimal, if any) interest against the legitimate interests of the property owner, the balance clearly indicates that the Town has taken Plaintiffs real property.

379. By constantly and unreasonably changing its land use laws, continuing to this day, the Defendant Town has deprived Plaintiff of all economically viable use of his land on a temporary and permanent basis.

380. Upon information and belief, the individual Defendants were aware that their conduct violated, and was designed to violate, Plaintiff's federal civil rights.

381. Upon information and belief, the law in this field of jurisprudence is long established, and the Defendants' actions reflect official municipal policy and practice.

D. De facto intrusion upon MareBrook

382. Upon information and belief, the Defendant Town's actions essentially amounted to the creation of open space and visual easements for the benefit of MareBrook's neighbors and others in the Town.

383. Upon information and belief, this amounted to a *de facto* invasion of Plaintiffs property, and the taking of land, and the property interest of visual easements and easements to light and air, for the benefit of MareBrook's neighbors and the townspeople.

384. This constitutes the *per se* taking of Plaintiff's real property without due process or the payment of just compensation.

385. Upon information and belief, the indefinite, and potentially permanent, keeping of Plaintiff's lands in an undeveloped, semi-forested state, thereby allowing it to be sown with tree seeds from neighboring property, is not materially different from being permanently flooded with water; and also constitutes an actionable invasion of property by the action of the Town and a further actionable taking of Plaintiff's property.

386. Upon information and belief, Defendants' governmental actions and governmental processes created an extraordinary delay regarding his right to use and subdivide his property, thereby destroying the "incidents of ownership," to which Plaintiff is entitled under the Fifth and Fourteenth Amend-

ments, and "taking" his property without due process or just compensation.

387. Upon information and belief, through their actions, Defendants have perpetrated both an actual regulatory and *de facto* regulatory taking of Plaintiff's property, and an actual or *de facto* invasion of his property, on the pretext of acting within the Town's police powers.

388. Upon information and belief, the Town's constant re-zonings, affecting MareBrook, cumulatively created a local regulatory scheme that violated the teachings of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), namely, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

389. Moreover, under the teachings of *Penn Central* and subsequent cases, the Town's actions have so frustrated distinct investment-backed expectations as to amount to a taking of property when considering factors such as:

- the economic impact on the Plaintiff of the challenged rule, regulation or statute;
- the extent to which the regulation interferes with investment-backed expectations; and
- the nature of the challenged action.

390. Moreover, the Supreme Court has affirmed, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that it is a question for a jury whether a developer has been denied all economically viable use of property and whether (after repeatedly imposing more rigorous demands) a

municipality's denial of the developer's proposal substantially advances legitimate public interests.

E. Vested rights; special facts; equitable estoppel

391. Through Defendants actions, it has sought to prevent Plaintiff from exercising the vested rights that he has obtained (by law and/or equity) as well as subdividing and developing his property.

392. Alternatively, Defendants have, through intent or negligence, improperly delayed Plaintiff's ability to obtain a "vested" property interest in his MareBrook application.

393. Upon information and belief, Defendant is liable to Plaintiff under the "special facts" exception, and also as a matter of equitable estoppel.

394. Plaintiff has been damaged thereby.

THIRD CAUSE OF ACTION— DENIAL OF SUBSTANTIVE DUE PROCESS OF LAW, AND PLAINTIFF'S LIBERTY INTEREST TO PURSUE AND ENGAGE IN A LAWFUL OCCUPATION AS A DEVELOPER
(U.S. Constit., amend. XIV)

394. Plaintiff hereby repeats and realleges each allegation contained in the paragraphs above as if fully set forth again here at length.

A. Arbitrary and irrational regulation of Plaintiff's land

395. Through Defendants' actions herein, Plaintiff has been deprived of due process of law, including, but not limited to, being deprived of his right to reasonably use and develop his real property; and

being deprived of his investment-backed expectations regarding the permissible use and development of his real property.

396. Upon information and belief, there was no legitimate basis for denying Plaintiffs MareBrook subdivision application, or to continually rezone his MareBrook property, upon any legitimate health, safety or public welfare basis.

397. Plaintiff committed substantial assets to the development of his real property in accordance with his MareBrook Project application(s) to the Town, and also undertook improvement as allowed by Town regulation, e.g., infrastructure development, including road clearing work, erosion control, and the construction of a model home, thereby further demonstrating his reasonable expectation of an entitlement to develop his land.

398. Upon information and belief, Defendant's denial of permission for Plaintiff to develop his real property has been improperly and maliciously motivated, involving an intentional, long-term plan to deprive Plaintiff of his ability to reasonably use, and subdivide, his land in an economically viable manner.

399. Plaintiff has satisfied the two-prong test for establishing a substantive due process claim since: 1) he had a valid property interest entitled to constitutional protection at the interest, and 2) the deprivation of the valid property interest was so outrageously arbitrary as to be a gross abuse of governmental authority.

400. Here, Plaintiff had a valid property interest in using and enjoying, and reasonably selling, his MareBrook land.

401. Through constant rezoning and other shenanigans (e.g., administrative and bureaucratic obstacle-creations), Plaintiff has been deprived of any and all use or benefit of his real property.

402. In addition, the method and manner of Defendant's action is "so outrageously arbitrary as to be a gross abuse of governmental authority."

403. Defendant's conduct is also malicious and improperly motivated as set forth in Plaintiffs equal protection claims, *infra*, and other claims for relief.

404. As a result of the Town's actions, Plaintiff has lost his initial investment, lost his subsequent personal investments into his MareBrook project, has suffered foreclosure actions being filed against him, greater claims, a personal judgment against him of $4 million by his lender, suffered the loss of credit, the potential for collection action, and has anxiety and emotional distress caused by the financial problems created by the Town's actions

B. Liberty Interest in an Occupation

405. Plaintiff has liberty interest in being able to pursue an occupation of his choice; and he has chosen an occupation as a land developer.

406. Through the arbitrary, capricious and unlawful actions of the Town, Plaintiff has been deprived of over 10 years of individual effort as a developer seeking to use and develop, and profitably sell, his real property.

407. As a real estate developer, Plaintiff had a legitimate claim of entitlement to lawfully pursue his

chosen occupation, and not to be obstructed through arbitrary governmental action.

408. Through its actions, therefore, the Town has deprived Plaintiff of his liberty interest in a gainful occupation without due process of law.

409. Plaintiff has been damaged thereby.

FOURTH CAUSE OF ACTION— DENIAL OF PROCEDURAL DUE PROCESS OF LAW

(U.S. Constit., amend. XIV)

410. Plaintiff hereby repeats and realleges each allegation contained in the paragraphs above as if fully set forth again here at length.

411. Upon information and belief, Plaintiff had various constitutionally-protected property and liberty rights concerning his real property, including the right to reasonably use his real property, to rely upon the legitimacy of local governmental regulatory action (e.g., that land use regulations will, for example, be consistent with the policies contained in a master plan), and to be afforded notice, and an opportunity to be heard, regarding governmental action which will burden his property rights or stigmatize his property.

412. Upon information and belief, Defendants have created a municipality policy, pattern and practice that Plaintiff will not be permitted to subdivide his property.

413. Upon information and belief, this municipal policy, whether intentional or *de facto*, has stigmatized Plaintiffs real property and thereby infringed upon Plaintiffs liberty interests within the meaning

of the due process clause of the Fourteenth Amendment

414. Upon information and belief, the Town's regulatory actions (e.g., repeated land use law changes directly resulting from the progress of Plaintiffs application) were aimed and targeted specifically at Plaintiff

415. Therefore, Defendant local government was required to provide, but has failed to provide, Plaintiff with basic due process procedures—notice and an opportunity to be heard—regarding its actions intended to prevent him from using and developing his real property.

416. In this regard, upon information and belief, the Defendant Town and Defendant Supervisor Tully have:

- failed to apprise Plaintiff of their intentions regarding his real property (including their secret agenda and intention to obstruct any and all development);
- failed to provide Plaintiff with notice of, and an opportunity to respond to, Defendants' (impermissible) grounds for obstructing Plaintiff's proposal;
- failed to provide Plaintiff with notice of governmental meetings (e.g. Town Board and its "Zoning Committee") proposing governmental action (e.g., rezoning) specifically affecting Plaintiff's real property and land use proposals.

417. Upon information and belief, Plaintiff was entitled to actual notice of the new zoning(s), especially zoning directly affecting (and designed to affect) his project, yet was given no actual notice(s).

418. Thus, Defendants have deprived Plaintiff of procedural due process of law.

419. Plaintiff was damaged thereby.

FIFTH CAUSE OF ACTION— DENIAL OF EQUAL PROTECTION OF THE LAW

(U.S. Constit., amend XIV and 42 USC section 1981)

420. Plaintiff hereby repeats and realleges each allegation contained in the paragraphs above as if fully set forth again here at length.

421. Upon information and belief, Plaintiff Sherman has been denied equal protection of the law.

A. Disparate treatment as a Jewish developer

422. Upon information and belief, Plaintiff was not treated in the same manner as similarly and/or identically situated applicants, for reasons completely arbitrary, irrational and without basis in legitimate land use planning or justifiable regulation.

423. Upon information and belief, the Town's *ad hoc* and extra-legal "illegal Zoning Committee" was composed almost entirely of biased, non-disinterested members, each of whom resided adjacent to, or within a quarter mile of, MareBrook, and whom were personally opposed to the MareBrook Project.

424. Upon information and belief, the Town's various zoning law amendments were sought and/or influenced by these biased, non-disinterested illegal

Zoning Committee members, which singled out Plaintiffs MareBrook Project for adverse treatment.

425. Upon information and belief, a reasonable inference can be made that Plaintiff was singled out for disparate treatment because of the fact that Plaintiff is Jewish, has Jewish business Associates, has an Orthodox Jewish lender, has Orthodox Jewish business partners, and has the potential for selling enough units of housing so that the new residents could form a village such as the Orthodox community of Kiryas Joel.

426. Upon information and belief, this prospect, although not based upon reality concerning the possibility of a Jewish village, is so frightening to some members of the local community, and to town politicians, that Plaintiff has been treated obstructed development of his land as described above.

B. Interference with Contract due to Religious/Race discrimination resulting from anti-Semitism

427. A motivation for denying Plaintiff the ability to develop MareBrook is the fear that Plaintiff (who is Jewish) and his various business associates or potential associates and/or lenders (who are also Jewish), might sell MareBrook housing to Orthodox Jews or Hassidic Jews.

428. Upon information and belief, some of the local citizenry, and the Town's political leadership (including Defendant Tully) were fearful that allowing MareHrook to be subdivided for residential housing would risk the creation of "another Kiryas Joel" style Hassidic village.

429. The Town's denial of Plaintiff's ability to use and subdivide his real property, based upon the fear that he might sell housing to Jews (Orthodox, Hassidic or otherwise), violated his right to the equal protection of the law and constituted both religious and race discrimination.[13]

430. Defendants' actions are discriminatory, and taken under color of law.

431. Defendants' actions are in violation of 42 U.S.C. § 1981, which states in relevant part that:

> "*(a) Statement of equal rights*
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, ... and to the full and equal benefit of all laws and proceedings for the security of ... property as is enjoyed by white citizens....
>
> *(c) Protection against impairment*
>
> The rights protected by this section are protected against impairment by ... impairment under color of State law.

432. Defendants have intentionally denied Plaintiff the equal benefit of the law, denied security as to his real and personal property, and impaired Plaintiff's ability to contract with other Jews to sell housing.

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[13] At the time of the ratification of the Fourteenth Amendment, Jews were viewed as a race. *See, e.g., Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). People who are Jewish are protected by 42 U.S.C. § 1981, under the Supreme Court's teachings in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) *and Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

C. Unlawful exclusionary zoning based upon religion

433. Upon information and belief, the Town's land use regulation and practices—including the practices engaged in regarding the MareBrook project—were designed to, and have the effect and impact of, creating a socioeconomic separation of classes in the Town through a scheme of restricted housing (or in lieu thereof, denying Plaintiff any subdivision at all).

434. Upon information and belief, this is unconstitutional as exclusionary zoning under the principles set forth in *Berenson v. the Town of New Castle*, 38 N.Y.2d 102 (1975) and *Continental Building Company v. Town of North Salem*, 211 A.D.2d 88 (3d Dep't. 1995), *app. dism'd, lv. den.*, 86 N.Y.2d 818 (1995), as it does not provide a properly balanced and well-ordered plan for the Town and ignores the established regional need for multifamily and affordable housing in Orange County.

D. "Class of One" equal protection violation

435. Upon information and belief, the Defendant Town and its officials disparately treated and singled out Plaintiff for adverse treatment regarding his MareBrook Project.

436. The Defendants thereby denied Plaintiff the equal protection of the law, actionable under the U.S. Supreme Court's "class of one" jurisprudence even if no suspect class discrimination, such as religious discrimination, is established herein.

437. In particular, on numerous occasions, the Defendant Town has treated Plaintiff in a manner distinctly different from other owners and developers of real property in the Town.

438. For example, the Defendant Town singled out Plaintiff when it stopped his MareBrook application's progress via a moratorium; and when it allowed him to proceed with his application and create a "deemed complete" DEIS 2003, but then refused to allow Plaintiff a hearing on his application for preliminary approval (as required by state law) by repeatedly changing the Town's local land use law in December 2003, June 2004, 2005, 2006, 2007 and 2009.

439. The Defendant Town also singled Plaintiff out for the imposition of excessive, unwarranted and unjustified consultant fees costs, and for exclusion from the Planning Board's agenda without justifiable cause, thereby preventing him from proceeding forward with his application in 2009 and 2010 and continuing up til and including September 2011.

440. The Town has engaged in the tactic of requiring a "perfect," comprehensive and all-encompassing FEIS from Plaintiff, causing Plaintiff exorbitant cost and excessive delay, without justification under state or local environmental or land use law. Essentially, the Defendant Town has required Plaintiff to answer every question by every resident in the Town pertaining to his application, though not requiring other developers or property owners to be so burdened when seeking Planning Board approvals.

441. The Defendant Town's repeated and ongoing adverse treatment towards Plaintiff has singled him out for abusively arbitrary and unfair treatment, with the apparent intent of preventing him from developing his 398 acres of real property and destroying him financially, so that the Town can create a *de facto* nature preserve out of his property, adjoin-

ing a State Park, without compensating him for the damage caused to him.

442. The Town's conduct towards Plaintiff has been so abusive and patently arbitrary as to shock the conscience.

443. Plaintiff has been damaged thereby.

SIXTH CAUSE OF ACTION— VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE N.Y.S. CONSTITUTION

444. Plaintiff repeats and reiterates the above allegations as if fully set forth here at length.

445. Defendant has deprived Plaintiff of the equal protection of the law, in violation of the Constitution of the State of New York.

446. Under the teachings of *Brown v. State*,[14] Plaintiff has a cognizable claim under the New York State Constitution for this violation of his rights to the equal protection under the law.

447. Plaintiff was damaged thereby.

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[14] *See, Brown v. State*, 89 N.Y.2d 172, 187, 674 N.E.2d 1129, 1138-39, 652 N.Y.S.2d 223, 232-33 (1996) ("we conclude that a cause of action to recover damages may be asserted against the State for violation of the Equal Protection and Search and Seizure Clauses of the State Constitution").

SEVENTH CAUSE OF ACTION— VIOLATION OF THE FREEDOM OF RELIGION, DUE PROCESS, AND RIGHT TO PETITION CLAUSES OF THE N.Y.S. CONSTITUTION

448. Plaintiff repeats and reiterates the above allegations as if fully set forth here at length.

449. Defendant has deprived Plaintiff of the freedom of religion, and discriminated against him on the basis of his religion and affiliation with other people of the Jewish faith, in violation of the Constitution of the State of New York.

450. Defendant has deprived Plaintiff of due process of law, in violation of the Constitution of the State of New York.

451. Defendant has deprived Plaintiff of the right to petition government for the redress of grievances, in violation of the Constitution of the State of New York.

452. Plaintiff was damaged thereby.

EIGHTH CAUSE OF ACTION— VIOLATION OF THE TAKINGS CLAUSE OF THE N.Y.S. CONSTITUTION

453. Plaintiff repeats and reiterates the above allegations as if fully set forth here at length.

454. Defendant has deprived Plaintiff of property, and has taken Plaintiff's property, in violation of the Constitution of the State of New York.

455. Plaintiff was damaged thereby.

456. Plaintiff requests this Court's declaration that compensatory relief for a regulatory taking of property is available only under federal law, based upon

current controlling precedent of the N.Y.S. Court of Appeals.

NINTH CAUSE OF ACTION—
DECLARATORY RELIEF DECREEING CONSULTANT FEE ORDINANCE INVALID ON ITS FACE AND AS APPLIED

457. Plaintiff repeats and reiterates the above allegations as if fully set forth here at length.

458. The Defendant Town has enacted a local law providing for the reimbursement of Town consultants (e.g., lawyers, engineers, planners) in connection with land use applications. *See*, Town of Chester Code, Chapter 48, which can be found at www.ecode360.com/print/CH0648.

459. Section 48-3 provides, at subsection "E":

> "The Planning Board, Zoning Board of Appeals or Town Board shall neither place the application on the agenda nor give further consideration to the applicant's application until all application review fees imposed on the applicant have been paid to the Town." (*(emphasis added)*

460. The Planning Board has interpreted this to mean that Plaintiff cannot be heard on the issue of whether he is being wrongfully or excessively invoiced for the Town consultants' services.

461. In particular, the Planning Board has delayed proceeding forward on Plaintiff's application, purportedly for non-payment of its consultants' fees, without invoicing Plaintiff for such fees and advising him of the need for payment.

462. The Town consultants' work was in review of Plaintiff's EIS documents under SEQRA.

463. Moreover, when the Planning Board eventually provided Plaintiff with its consultants' invoices, Plaintiff properly disputed those invoices as improper, excessive, redundant, duplicative and unauthorized.

464. Specifically, by letter to the Town Board and Planning Board dated June 24, 2011, Plaintiff appealed to the Town Board disputing the consultant fee charges.

465. Nevertheless, the Planning Board refused to further process Plaintiff's land use application, even though such refusal contravenes the State's SEQRA regulation. *See*, 6 N.Y.C.R.R. 617.13(f) ("Such appeal procedure must not interfere with or cause delay in the EIS process or prohibit an action from being undertaken");

466. Moreover, the Town Board failed to process Plaintiff's consultant fee appeal within the 45 time period established by Town Code § 48-5.

467. Consequently, Plaintiff's application was placed on hold, thereby forcing Plaintiff into another period of delay.

468. The consultant fee reimbursement provisions contained in Chapter 48 are open-ended, and essentially allow the Town and its consultants to demand a "blank check" from an applicant to pay for unnecessary reviews, apparently at the unfettered discretion of the Town's consultant, with no check on such fees (as the applicant, not the Town, pays the fees; thus, there is no constraint of reasonableness placed upon the consultant).

469. There is one constraint imposed upon the Town's consultants, which is that the applicant can appeal consultant fee abuse to the Town Board.

470. However, after Plaintiff timely filed such appeals in 2010 and 2011, the Town Board simply ignored the appeal and refused to act.

471. Because of the Town Board's refusal to act, Plaintiff made a written demand upon the Town Board; and, within one month thereafter, commenced an Article 78 proceeding in State Court challenging the consultant fee exactions. *See, Sherman v. Town of Chester Town Board et al.*, Index No. -11.

472. Plaintiff has commenced an Article 78 proceeding in this Court, challenging the Town's administrative action in exacting consultant fees from him. *See, Matter of Steven Sherman*, Orange County Index # 010376/2011 (Woods, J).

473. On its face, and as applied, the Defendant's consultant fee regulation is invalid as a violation of due process, equal protection, and as a governmental taking of property without just compensation.

474. This Court must so declare.

A. No opportunity for a hearing as to consultants' fees

475. The failure of the Town and its Planning Board to make provisions in its Consultant Fee ordinance (for a land use applicant to be adequately heard as to a monetary exaction made against him by the Town) deprives the applicant of basic due process, namely, the ability to be heard when his property is being taken. The Town Code provides for an "appeal", but does not set forth a procedure for such appeal.

476. In light of the complexity of SEQRA and SEQRA reviews, the many complexities of land use cases, and the significant amounts of money that may be involved (as here, in the amount of over $80,000), an applicant who disputes invoiced charges should have the opportunity for an arbitration or similar hearing to impartially resolve the dispute at a constitutional minimum.

477. Without an impartial adjudicator, an "appeal" essentially becomes a constitutionally meaningless charade.

478. An opportunity for a hearing, before an impartial adjudicator, is the minimum that due process requires.

479. Therefore, because of the many deficiencies described above, the Town's consultant fee reimbursement provisions contained in Chapter 48 must be declared invalid, on its face, and void.

480. Alternatively, for this additional reason, the Town's consultant fee reimbursement provisions must be adjudged and declared as unconstitutional, on its face and as applied, as Plaintiff has not been afforded the opportunity to be heard regarding the legitimacy, validity, excessiveness and otherwise invalidity of the invoices as billed against his project; and as Plaintiff's project is delayed, notwithstanding the SEQRA regulation, which prohibits the delay of processing of an application that is pending a fee appeal.

481. Plaintiff requests the Court to declare that the Town's failure to provide Plaintiff with the ability to be heard by the Planning Board or the Town Board is a violation of his due process rights.

482. Because the action taken by the Town, and especially its "appeals" process, do not involve "random and unauthorized acts," but rather are matters of formal Town procedure, all applicants disputing consultant fee charges are entitled to a pre-deprivation hearing by the Town prior to such fees being exacted from the applicant.

483. Accordingly, even if the Town is authorized to exact consultants' fees (notwithstanding that such are unlimited, open-ended and set by the self-interested consultants), the Court should declare that Plaintiff has the due process right to an impartial adjudicator to resolve *bona fide* disputes regarding the amount of the consultants' fees.

484. In sum, this Court must declare that the Town's consultant fee ordinance is unconstitutional on its face and as applied; and that to the extent that such ordinance or future ordinance is permissible, it must include a provision for an impartial hearing prior to demanding payment of a disputed fee.

PLAINTIFF DEMANDS A JURY TRIAL HEREIN.

WHEREFORE, Plaintiff prays that this Court grant judgment against the Defendants awarding Plaintiff damages and other appropriate relief as follows:

a. An award of compensation for the taking of his real property under New York State law and 42 U.S.C. § 1983;

b. An award of damages under New York State law and 42 U.S.C. § 1981 and § 1983 for the violations of law alleged herein;

c. An award granting Plaintiff reimbursement of "consultant fees" paid to the Town, to the ex-

tent such relief is more appropriate in this action than in the pending article 78 proceeding;

d. A declaration that Plaintiff has been denied his right to petition the Town,

e. A declaration that the Town's consultants' fee reimbursement regulation is unconstitutional and invalid;

f. An order converting to any portion of this action to a proceeding under CPLR Article 78 to the extent this court deems such is necessary;

g. An award of reasonable attorneys' fees and the costs of this action under 42 U.S.C. § 1988, together with such other and further relief as this Court may deem just and proper.

Jury Demand

Plaintiff requests trial by jury in this action.

Dated: Stony Point, New York
January 12, 2012

MICHAEL D. DIEDERICH, JR.
Attorney for Plaintiff
By:

/s/ Michael D. Diederich, Jr.
Michael D. Diederich, Jr.
Attorney for Plaintiff
361 Route 210
Stony Point, N.Y. 10980
(845) 942-0795
Mike@DiederichLaw.com

Exhibit "1" MareBrook conceptual layout

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12 Civ. 00647 (ER)(GAY)

STEVEN M. SHERMAN,

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD, AND ITS PLANNING BOARD,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed Declaration of Joseph J. Haspel, Esq. and the exhibits annexed thereto; the accompanying Memorandum of Law in Support of Defendants' Motion to Intervene, and upon all pleadings and proceedings heretofore had herein, Laroe Estates, Inc. will move this Court before the Honorable Edgardo Ramos at the United States District Court for the Southern District of New York, located at 40 Foley Square, New York, New York 10601, on a date and time to be determined by the Court, for an Order, pursuant to Fed. R. Civ. P. 24 granting it leave to intervene, together with such other and further relief as this Court deems just, equitable, and proper.

PLEASE TAKE FURTHER NOTICE that the scheduling of filing opposition papers shall be in accordance with the Minute Entry of the Court's Docket dated June 20, 2014

Dated: July 31, 2014
Goshen, New York

/s/ Joseph J. Haspel
Joseph J. Haspel, Esq.
Attorney for Laroe Estates, Inc.
1 West Main Street
Goshen, New York 10924
845-694-4409

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12-00647 (ER)(GAY)

STEVEN SHERMAN,

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD, and IT'S PLANNING BOARD

Defendants.

MEMORANDUM OF LAW

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(845) 694-4409

[Table of Contents omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12-cv-00647 (ER)(GAY)

STEVEN M. SHERMAN,

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD, AND ITS PLANNING BOARD,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF LAROE ESTATES, INC. TO INTERVENE

Laroe Estates, Inc. ("Laroe") respectfully submits this Memorandum of Law in support of its Motion for Leave to Intervene as Defendants in this action, pursuant to Federal Rule of Civil Procedure 24.

This case presents, *inter alia*, a constitutional Takings Claim asserted by Plaintiff, Steven M. Sherman ("Sherman"). However, while Sherman does have an interest in the real property at the core of this controversy, Laroe too has an interest. And, as will be shown below, Laroe's interest is more significant, as a matter of law, than Sherman's interest.

Since Laroe's interest cannot be adequately protected by any other party, and since proceeding with

this action without Laroe will necessarily impair and impede Laroe's ability to protect itself, Laroe makes this motion to intervene as a party plaintiff. A copy of Laroe's proposed pleading is annexed as Exhibit A.

I. FACTS

Sherman commenced this lawsuit asserting various causes of action.[1] A copy of the Complaint is annexed as Exhibit B. After this action was commenced, the defendant, Town of Chester ("Town" or "Chester") made a pre-answer motion to dismiss (Docket Nos. 6, 7, and 8), and by Opinion and Order dated March 20, 2013, this Court granted the motion (the "Dismissal Order") (Docket No. 14).[2] Sherman appealed the Dismissal Order and on May 16, 2014, the United States Court of Appeals for the Second Circuit reversed the Dismissal Order (the "Second Circuit Decision"). A copy of the Second Circuit Decision is annexed as Exhibit C.

Twelve days later, in accordance with Chamber's Rules, Laroe's counsel wrote the Court seeking a pre-motion conference relating to its desire to move to intervene in this action. (Docket No.16). The promotion conference occurred on June 20, 2014 at which time the Court fixed a schedule for this motion.

For the purpose of this motion to intervene, Laroe will focus on the Constitutional Takings claim. The facts as alleged in the Complaint were reviewed in

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[1] Since the commencement of this action, Sherman has deceased and Nancy Sherman as executor of the Estate of Steven Sherman has been substituted as Plaintiff.

[2] The Court also remanded the non-Federal claims back to State Court.

the Second Circuit Decision vacating the Dismissal Order. Laroe adopts the Statement of Facts set forth in the Second Circuit Decision.

In summary, Sherman has alleged that he was the proponent of a subdivision application before the Chester Planning Board. He further alleges that the conduct of the Town effectuated a *de facto* taking of the subject real property defined in the Complaint as "MareBrook" (the "Real Property"). This conduct was exhaustively chronicled in the Second Circuit Decision, and the Second Circuit concluded that if the facts as alleged in the Complaint were true, the conduct of the Town had effectuated a taking.

With the background fully set forth in the Second Circuit Decision, the focus turns to Laroe's position and how the facts support this application for intervention. The natural starting point is Sherman's Complaint, which states in its pertinent part:

> 363. As a result of the Town's obstruction of Plaintiffs attempts to use and develop his real estate, Plaintiff has been the subject of foreclosure proceedings. Due to economic necessity, Plaintiff has been forced to contract away the majority of his economic interest in MareBrook to lenders and investment partners; and one of his lenders, TD Bank, has obtained a personal judgment against Plaintiff in the sum of $4 million. Collection action against Plaintiffs personal assets is an obvious possibility.
>
> 364. Plaintiff has lost 80% or more of his equity and ownership share of MareBrook to bring in investors.

Laroe believes that the Complaint's reference to "investment partners" is a reference to Laroe. How-

ever, the term "investment partner" is a misnomer. In fact, as is fully discussed below, Laroe is the equitable owner of the Real Property. The facts supporting Laroe's equitable ownership follow.

On June 4, 2003, Sherman and Laroe entered into a contract for the purchase and sale of the Real Property, a copy of which is annexed as Exhibit D (the "Sherman/Laroe Contract"). The essence of the Sherman/Laroe Contract was that Laroe would purchase the Real Estate and the price would be based upon the number of lots approved by the Town upon Sherman's application. As is discussed ***infra***, certain terms of the Sherman/Laroe Contract, including the purchase price, were later amended.

The provisions of the Sherman/Laroe Contract which are relevant to the instant application are as follows: A) Pursuant to ¶4(A), Sherman was responsible for prosecuting the subdivision application before the Town, however, the land use planning issues (i.e. size and location of building lots and road configuration) were subject to Laroe's approval; B) Through the various provisions in ¶4(B) of the Sherman/Laroe Contract, Laroe was responsible for many of the developments costs; C) ¶11 of the Sherman/Laroe Contract provided:

> 11. RISK OF LOSS:
>
> In the event of any taking of the Property by the power of eminent domain, or casualty to the Property which would reasonably hinder or interfere with Purchaser's [Laroe's] proposed use or development of the Property, then Purchaser may terminate this Agreement by written notice to Seller, in which event Purchaser shall receive a reimbursement in immediately available fed-

> eral funds of all monies paid by Purchaser to Seller hereunder together with accrued interest at the annual rate of ten (10%) percent from and including the relevant date of payment by Purchaser to Seller to and including the date of reimbursement by Seller to Purchaser. **If Purchaser does not elect to terminate this Agreement, then Seller and Purchaser shall be deemed to have elected to proceed with Closing, in which event Seller shall assign to Purchaser all of Seller's right, title and interest in and to any and all claims and proceeds Seller may have with respect to any condemnation awards or insurance proceeds relating to the Property.** (emphasis added)

Notwithstanding all the events that have transpired in the last decade, the Sherman/Laroe Contract was never terminated. To the contrary, on May 7, 2013, Sherman and Laroe agreed to an amendment of the Sherman/Laroe Agreement entitled "Settlement Agreement and Amendment of Purchase and Sale Agreement Dated June 4, 2003 (the "Amendment"), a copy of which is annexed as Exhibit E.

Through the Amendment, Sherman acknowledged: A) That Laroe had advanced $2,550,000 into the project (the "Laroe Advances"); B) That Sherman had defaulted on his obligations to not only Laroe, but alsoTD Bank causing the entry of a judgment of foreclosure; and C) That Sherman and Laroe en-

gaged in an arbitration proceeding to settle their differences.[3]

The Amendment then proceeded to modify the payment terms of the Sherman/Laroe Contract to provide that the purchase price would be the Laroe Advances, plus any amount paid to settle Sherman's obligation to TD Bank, plus lots approved based upon a formula. Settlement with TD Bank was in the sole discretion of Laroe and in the event the TD Bank Mortgage foreclosure was not settled prior to foreclosure sale, Laroe had the ability to terminate the Sherman/Laroe Contract, as amended. (Amendment ¶2).

The Amendment further provided:

> Section 3.
>
> Subject to Purchaser's performance in transferring the Lots, if any, as set forth in Section 2, the purchase price for the Property is deemed paid in full as provided hereinabove.

Thus, through the Amendment, Sherman recognized that he had been paid in full for the Real Property, subject only to the possibility of future consideration in the form of lots depending upon the number of lots ultimately approved by the Town.

Notwithstanding the parties acknowledgment of full payment by Laroe, in order to protect Laroe, closing would not occur until the foreclosure proceeding was resolved (Amendment ¶6). As stated above, settlement with TD Bank was in the sole discretion

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[3] Although not set forth in the Amendment, the Arbitration Ruling required Sherman to convey the Real Property to Laroe (Exhibit F).

of Laroe, and Laroe had the option of terminating the Sherman/Laroe Contract if a foreclosure sale occurred.

The Amendment further provided:

> 7. Application & Approval Option. A. Within 30 days of the date hereof, Purchaser and Seller shall cause the Application to be amended to add Purchaser as an additional "applicant" thereunder. All further expenses of the application to be paid by Purchaser. ...

Simply stated, after Sherman's defaults with TD Bank and Laroe, and after the Arbitration (which gave Laroe full rights in the Real Property), the Amendment further memorialized Laroe's equitable ownership of the Real Property. Contemporaneously with the Amendment, the parties executed other agreements including a consulting agreement which provided Sherman with the ability to continue to participate in the development of the Real Property. A copy of which is annexed as Exhibit G.

After the Amendment, and after the facts alleged in the Complaint occurred, which fact led the Second Circuit to conclude that a taking had taken place, TD Bank concluded its foreclosure proceeding (See, Exhibit H).

II. - LEGAL ARGUMENT

A. Under New York Law, Laroe Holds Equitable Title To the Subject Real Property, Which Interest Is Superior to The Bare Legal Title Held By Sherman

In New York, a land contract vendor (Sherman) holds legal title, while the land contract vendee (Laroe) holds equitable title. "[The execution of a contract for the purchase of real estate and the making of a part payment gives a contract vendee equitable title to the property and an equitable lien in the amount of the payment." *Polish Natl. Alliance of Brooklyn v. White Eagle Hall Co.*, 98 A.D.2d 400, 405, 470 N.Y.S.2d 642 (2nd Dep't 1983); *New York Cent. & Hudson Riv. R. R. Co. v Cottle*, 187 A.D. 131, 144 (4th Dep't 1919), *affd* 229 NY 514 (1920) (holding: "It is well settled that the owner of the real estate from the time of the execution of a valid contract for its sale is to be treated as the owner of the purchase money and the purchaser of the land is to be treated as the equitable owner thereof. The purchase money becomes personal property"); *Bean v. Walker*, 95 A.D.2d 70, 72, 464 N.Y.S.2d 895 (4th Dep't 1983); *Carnavalla v. Ferraro*, 281 A.D.2d 443, 722 N.Y.S.2d 47, 48 (2nd Dep't 2001); *Lowenstein v. Reikes*, 140 Misc. 645, 251 N.Y.S. 618 (N.Y. Sup.Ct. Queens Co.1931).

In effect, holding equitable title gives the land contract vendee full rights of ownership. *In re Site for Jefferson Houses, City of New York*, 306 N.Y. 278, 282, 117 N.E.2d 896, 898 (1954); *Karp v. Twenty Three Thirty Ryer Corp.*, 185 Misc. 440, 442, 56 N.Y.S.2d 783, 785, *aff'd* 270 A.D. 758, 59 N.Y.S.2d 919 (1st Dep't 1946) (holding that a contract vendee is

in equity considered as the owner and so acquires an 'estate and interest' in the real property. 'A contract for the sale of real estate immediately vests in the purchaser the equitable title while the vendor remains seized in the land for the benefit of the purchaser and holds the legal title only as security for the payment of the remainder of the purchase price. *See also,* Williams v. Haddock, 145 N.Y. 144, 39 N.E. 825 (1895) *Lippe v. Genlyte Grp. Inc.*, 98 CIV. 8672(DC), 2002 WL 531010 (S.D.N.Y. 2002), stating:

> Legal title is formal title that is evidenced by a deed or other instrument constituting evidence of ownership rights in property. See Black's Law Dictionary 1493 (7th ed.1999). Equitable title, on the other hand, is "a beneficial interest in property and ... gives the holder the right to acquire formal legal title." (*Id.*). In New York, transfer of legal title to property can be effected only by actual physical delivery and acceptance of an executed deed. *Mitchell v. Bartlett*, 51 N.Y. 447, 447 (1873) ("[L]egal title cannot vest under a deed before its delivery."); N.Y. Real Prop. § 244 (McKinney 1989). Upon the execution of a contract for the sale of land, however, the purchaser acquires equitable title to the property, and the vendor is treated as the owner of purchase money, *i.e.*, personal property. *Bean*, 464 N.Y.S.2d at 897 (*citing Williams v. Haddock*, 145 N.Y. 144, 150 (1895)); *Penny Lane Owners Corp. v. Conthur Development Co.*, No. 94 Civ. 0940, 2000 WL 178189, at 10 (Feb. 16, 2000 S.D.N.Y.) (citations omitted). The vendor holds the legal title in trust for the purchaser, and has an equitable lien against the property for payment of the purchase price. *Bean*, 464 N.Y.S.2d at 897; *Penny Lane*, 2000

> WL 178189, at *10. Legal title does not vest in the purchaser until the contract terms are satisfied. *Bean*, 464 N.Y.S.2d at 897 (citations omitted).

Id.

In the context of a takings case, the issues presented are analogous to a condemnation. It is well settled that "[i]n order to have standing in a condemnation proceeding one must show an ownership interest in the property" (*In re Port of New York Auth.*, 12 A.D.2d 18, 20 [1960], *citing Matter of City of New York* [*Jefferson Houses-Lombardi*], 306 N.Y. 278 (1954) (holding that the vendee under an executory contract to purchase land was an owner). Likewise, the Appellate Division, Second Department found that a claimant seeking compensation for condemned property may seek recovery by demonstrating an equitable interest therein, as opposed to legal title" (*Johnson v. State*, 10 A.D.3d 596, 597 (2nd Dep't 2004).

With respect to a governmental taking by condemnation, the Appellate Division has held that the transaction is between the taker (the government) and the holder of equitable title. The Appellate Division stated:

> This is not a case of thrusting the equities of a party on him, but of holding him to his contract. The vendor is able to give him all he contracted to. The state has intervened, and under its right of eminent domain substituted for the land its value. In legal effect, as between vendor and vendee, the award becomes the subject of the conveyance. The plaintiff took the equitable title, subject to the exercise of the right of eminent do-

> main, precisely as though the legal title had been transferred; and the possibility of the land being taken for public use should be deemed to have been within the contemplation of the parties. The taking of land by proceedings in invitum is in a legal sense a purchase and sale (Vandermulen v. Vandermulen, 108 N. Y. 195, 15 N. E. 383), and, of course, the equitable owner must be deemed the vendor.

Clarke v. Long Island Realty Co., 126 A.D. 282, 283, 110 N.Y.S. 697, 698 (2nd Dep't 1908).

Based upon the foregoing authority, it is clear that Laroe was the owner of a substantial interest in the Real Property at issue in this case, and it was the owner of that interest at the time of the taking by Chester. Indeed, if this were a simple condemnation case, there is no question that based upon the law cited above, as well as the Contract between the parties which gave Laroe an assignment of any condemnation award, Laroe would have most, if not all of the right to collect damages from the Town. The fact that this is a constitutional takings case and not a condemnation proceeding is a distinction without a difference.

Laroe is mindful of the case cited in the Town's correspondence prior to the pre-motion conference, *R & V Dev., LLC v. Town of Islip*, 05CV5033(DRH)(MLO), 2007 WL 14334 (E.D.N.Y. Jan. 3, 2007) which found, contrary to well settled law, that a contract vendee is not the equitable owner of real property with an interest in the real property. It is respectfully submitted that that case, which is not binding on this court, does not address the law of equitable ownership. Accordingly, it is

respectfully submitted that it is not good law. Regardless, in this case under the "Risk of Loss" provision set forth above, it is Laroe that has the contractual interest in any and all claims and proceeds Sherman may have with respect to any condemnation (takings) awards.

B. Rule 24 Intervention

1) This Court Must Construe Rule 24 Broadly And Resolve All Doubts In Favor Of Intervention

The purpose of Rule 24 intervention is twofold: "to foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation conducted without their participation." *See, e.g., Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977).

This Court must construe Rule 24 liberally in favor of intervention. *US. Postal Serv. v. Brennan*, 519 F .2d 188, 193 n.2 (2d Cir. 1978) ("The policy of liberalizing the right to intervene in federal actions is reflected in the change of language of Rule 24(a) in 1966."). Accordingly, any doubt as to whether Laroe should be permitted to intervene in this action should be resolved in its favor.

2) FED. R. CIV. P. 24(A) Entitles Laroe To Intervention In This Case As A Matter Of Right

Laroe seeks to intervene herein as a matter of right pursuant to Fed. R. Civ. P. 24(a), which provides, in relevant part, as follows:

> Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> * * *
>
> (2) claims an interest relating to the property or transaction that is the subject of the ac-

> tion, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In this Circuit, Laroe may satisfy the Rule 24(a)(2) requirements by showing that it (1) timely filed an application to intervene, (2) established an interest in the action, (3) demonstrated that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action. *"R" Best Produce Inc. v. Shulman Corp.*, 467 F.3d 238, 240 (2d Cir. 2006). Generally, the court's analysis must take into consideration the totality of the circumstances. *Farmland Dairies v. Comm'r of the N Y. State Dep't of Agric. & Mkts.*, 84 F.2d 1038, 1044 (2d Cir. 1988). For the reasons set forth below, Laroe satisfies each requirement and should be permitted to intervene.

C. Laroe's Motion to Intervene Is Timely

To determine whether the motion of a party seeking to intervene is timely, the Second Circuit considers four factors: "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *In re Bank of NY Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003) (*quoting United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

1(A) Notice of interest: Laroe seeks to intervene immediately after the Second Circuit Decision reversing the District Court's dismissal and remanding

the matter for further proceedings. At this juncture, issue has not been joined, and there has been no discovery. This application has been made at Laroe's earliest opportunity and therefore it satisfies each of the four criteria. Because this case is in the preliminary motion stage of the litigation, i.e. a new "motion to dismiss" stage, there has been no delay in the filing of the motion and no prejudice will result to the parties if Laroe intervenes. *See United States for the Use and Benefit of Frank M. Sheesley Co. v. St. Paul Fire and Marine Insurance Co.*, 239 F.R.D. 404, 412 (W.D.Pa. 2006) (the motion to intervene was timely when filed while the case was still in its initial stages and the discovery period was still open).

Laroe learned about this case after it was commenced, and after Chester moved to dismiss the action. Based upon the issues presented in the Motion to Dismiss, Laroe determined to await the outcome of the motion before taking any action. Then, the case was dismissed based upon this Court's finding that that actions of the Town were not final. Accordingly, there was no action in which Laroe could intervene. Its time to intervene accrued only after the Second Circuit Decision was rendered. Laroe has acted promptly in filing its motion to intervene. Indeed, Laroe moved before issue was joined, and prior to the Town has indicating whether it will be making another pre-answer motion to dismiss.

1(B) No Prejudice to Existing Parties. Since this action is in its earliest stage, the existing parties to this action will not be prejudiced if Laroe is permitted to intervene. Permitting Laroe to intervene will

not delay the action in any way. Likewise, it would neither extend nor expand discovery.

1(C) Prejudice to Laroe. Although the existing claimants would not be prejudiced by Laroe' s intervention, Laroe would be significantly prejudiced if it were not permitted to intervene. By showing that it is the equitable owner of the subject Real Property, Laroe has demonstrated an interest in the litigation, and this interest may be impaired by the disposition of the action without intervention because the plaintiff cannot adequately represent Laroe's interest. Indeed, Sherman has little to no incentive to ensure that Laroe's interests are addressed and satisfied. *Cf. Berroyer v. United States*, 282 F.R.D. 299 (E.D.N.Y. 2012); *Turkmen v. Ashcroft*, 02-CV-2307 JG, 2010 WL 3398965 (E.D.N.Y. 2010) report and recommendation adopted, 02-CV-2307JG SMG, 2010 WL 3398968 (E.D.N.Y. Aug. 26, 2010); *Cole Mech. Corp. v. Nat'l Grange Mut. Ins. Co.*, 06 CIV. 2875 LAK HBP, 2007 WL 2593000 (S.D.N.Y. 2007); *CARS (Citizens Against Retail Sprawl) v. U.S. Army Corps of Engineers*, 04-CV-0328E(SR), 2007 WL 2778605 (W.D.N.Y. 2007)

In addition, if Laroe is not allowed to intervene in this action, it may be barred by the applicable statute of limitations from commencing its own action covering all of its damages. This is especially true in this case where, under the Second Circuit Decision, the accrual date for statute of limitations purposes is difficult to isolate. *See, New Jersey Carpenters Health Fund v. Residential Capital, LLC*, 08 CV 8781 HB, 2010 WL 5222127 (S.D.N.Y. Dec. 22, 2010)

1(D) Any unusual circumstances militating for or against a finding of timeliness.

Since this action was commenced, two unusual circumstances have occurred which altered Laroe's position. First, Sherman's default with respect to his obligations to TD Bank has resulted in a foreclosure. Historically, Laroe's interests were in developing the Real Property. Now, as a result of the foreclosure, Laroe seeks to recover its losses. As the Second Circuit Decision clearly casts blame for the projects financial failure upon the Town's conduct, it logically follows that this lawsuit is the appropriate vehicle for Laroe to seek recovery of its losses.

Secondly, Laroe has historically dealt with Steven Sherman. While that relationship was not without controversy, it was always clear that both Steven Sherman and Laroe were united in interest in pursuit of the Real Property's subdivision application. Now, Steven Sherman has deceased and Laroe is without a person with whom it feels it is united in interest.

D. Laroe Has a Direct Personal and Financial Interest in the Lawsuit.

As shown above, Laroe has a direct interest in the subject matter of this litigation. The issue presented in this lawsuit is whether the Town's actions constituted a taking of the Real Property. Laroe is the equitable owner and proposed developer of the property. Thus, if the Town took the Real Property, it took Laroe's property.

E. Laroe's Interest Will Be Impaired, Impeded, and Prejudiced if They It Is Not Permitted to Intervene.

The remedy for a Takings Claim is just compensation for the value of the property taken. *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005); *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014); *Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219, 231 (Fed. Cl. 2014). Thus, the value of property taken by way of government action is the limitation of the government's exposure when it takes property. All parties with an interest in property taken have a stake in the outcome. Issues of fact, including the value of the property in the aggregate and the value of each party's interest in the subject property must be determined. *See, e.g. United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993) (holding that the disposition of the condemnation proceedings at issue would impair the ability of proposed intervenors to protect their interest and granting intervention as a matter of right).

Here, Laroe should have the ability to protect its interest by participating in any proceeding which determines the value of the subject real property taken by governmental action.

Moreover, in order to fairly adjudicate the issues presented, the trier of fact will have to determine the relative allocation of rights over the fund created by the determination of value. Specifically, what is the value of Sherman's bare legal title as compared to Laroe's equitable title in the subject property. Unless Laroe participated, the allocation would likely be unfairly skewed.

F. The Parties Currently Participating in the Turnover Action Cannot Adequately Represent Laroe.

An intervenor's burden of showing that its interests may not be adequately represented is, generally speaking, a "minimal" one. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); Brennan, 579 F.2d at 191. Laroe easily meets this burden.

Laroe's interest in this matter is not adequately represented by Sherman. The interests of Sherman and Laroe are not necessarily identical and, as set forth above, they are conflicting. *See U.S. ex rel. Frank M Sheesley Co. v. St. Paul Fire & Marine Ins. Co.*, 239 F.R.D. 404, 409 (W.D. Pa. 2006). Sherman, as an adversary of Laroe, cannot, adequately represent Laroe's interests. Sherman has his own agenda. Because the proceeds from any judgment or settlement may not be sufficient to satisfy all interest, each claimant will seek to maximize his potential recovery to the exclusion of the other interest holders. Consequently, unless Laroe is permitted to intervene, no one will represent its interests. *See Brody v. Spang*, 957 F.2d at 1123 (3d Cir. 1992) ("the presumption of adequacy is defeated if the movant shows a sufficient divergence between its interests and those of the existing party"). The present motion was filed after Laroe requested a meeting with Sherman's to determine a method to proceed with unity. The parties have not been able to determine such a method.

3) ALTERNATIVELY, LAROE SHOULD BE PERMITTED TO INTERVENE UNDER FED. R. CIV.P. 24(b).

Even if this Court concludes that Laroe does not qualify to intervene as a matter of right under Fed. R. Civ. P. 24(a), it should, nevertheless, be permitted to intervene under Rule 24(b), governing permissive intervention. This section provides, in relevant part, as follows: Permissive Intervention.

In General. On timely motion, the court may permit anyone to intervene who:

* * * *

> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> * * *
>
> (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

The requirement for common questions of law or fact is "read in the disjunctive; i.e., only one common question of law or fact is required." William Schwartzer, A. Tashima, & James Wagstaff, Fed. Civil Procedure Before Trial, § 7:249 (2012).

As a general rule, when exercising its discretion under Rule 24(b), the Court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Courts may also consider (1) the nature and extent of the intervenor's interests, (2) the degree to which those interests are adequately represented by other parties, and (3) whether parties seeking intervention will significantly contribute to full development of

the underlying factual issues. *Resto-A-Dent Labs, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 875 (2d Cir. 1984); *U. S. Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978).

The reasons supporting Laroe's request to intervene as a right also support its request for permissive intervention under Rule 24(b). The existing parties will not be prejudiced, and adjudication of the claims will not be delayed. Moreover, Laroe's interests will be significantly prejudiced without such intervention and Sherman cannot adequately represent the Laroe's interests.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that Laroe's motion be granted and Laroe be permitted to intervene.

Dated: July 31, 2014
Goshen, New York

/s/ Joseph J. Haspel

Joseph J. Haspel, Esq.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12-cv-00647 (ER)(GAY)

STEVEN M. SHERMAN
and LAROE ESTATES, INC.

Plaintiff,

-against-

TOWN OF CHESTER, ITS TOWN BOARD,
AND ITS PLANNING BOARD,

Defendants.

COMPLAINT

Intervening Plaintiff, Laroe Estates, Inc., through its attorney Joseph J. Haspel, complains of the Defendants as follows:

THE PARTIES

1. Plaintiff, Steven M. Sherman, was at all times relevant herein, a citizen of the United States and a resident of the Town of Monroe, County of Orange, and State of New York. Since the commencement of this action, Steven M. Sherman has deceased and Nancy Sherman is the executor of his Estate.

2. Laroe Estates, Inc. is a New York corporation with its principal place of business located a 5 Eastview Avenue, Monsey, New York.

3. Defendant, Town of Chester ("Town") is and was, at all times relevant hereinm, a municipal

corporation organized and existing under the laws of the State of New York, with its Town Hall located at 1786 Kings Highway, Chester, NY 10918.

4. Defendant, Town Board of the Town of Chester ("Town Board") is and was at all times relevant herein, the duly elected governing body of the Defendant Town.

5. Defendant, Planning Board of the Town of Chester, ("Planning Board") is and was, at all times relevant herein, the duly appointed planning board of the Defendant Town. The Town, Town Board and Planning Board are collectively referred to herein as (the "Town of Chester").

JURISDICTION AND VENUE

6. This is a pending action having been removed to Federal Court by the Defendants.

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)3 and (a)4, which confer original jurisdiction of federal district courts to redress the deprivation of rights, privileges and immunities secured by the laws and Constitution of the United States.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), and the acts and transactions complained of occurred in this district.

STATEMENT OF FACTS[4]

9. The Town Board is the governing body of the Town of Chester, and the Planning Board gives approvals to land use development proposals.

10. In March of 2000, Sherman applied to the Planning Board for subdivision approval so that he could use and develop a parcel of real property defined in Sherman's Complaint as "MareBrook" ("MareBrook" or the "Real Property").

11. The proposed project was to include 385 units of housing as well as "an equestrian facility, baseball field, tennis courts, clubhouse, onsite restaurant and a golf course that wove through the property."

12. When Sherman completed his purchase of the property in 2001, it was already zoned for residential use.

13. In July 2001, the Town Board announced that it was imposing a six month moratorium on major subdivision approvals retroactive to May 1, 2001.

14. At least two members of the Town Board expressed the view that "the Moratorium was specifically aimed at Plaintiffs MareBrook project."

15. Sherman was the only developer affected by the Moratorium, even though other projects were similarly situated.

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[4] The Statement of Facts is largely taken from the Decision of the United States Court of Appeals for the Second Circuit which vacated in part the decision of the District Court dismissing Sherman's Complaint herein. *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014)

16. When the six month period expired, the moratorium was extended, which "singularly affected" Sherman.

17. During the extension, Sherman applied for a "minor" subdivision approval that was permitted under the moratorium. However, the Town still refused to allow Sherman to pursue the application.

18. Sherman brought suit against the Town in state court, and as a result of the lawsuit, the Town ended the moratorium, but not until January 2003.

19. The six month moratorium lasted over a year and a half.

20. In October 2003, the Planning Board" deemed complete" Sherman's Draft Environmental Impact Statement ("DEIS").

21. That determination established that Sherman's application to the Town was satisfactory in form and content.

22. In 2003, the Town Board approved the first in a series of changes to its zoning regulations.

23. On June 4, 2003, Sherman and Laroe entered into a contract for the purchase and sale of the Real Property.

24. The essence of the Sherman/Laroe Contract was that Laroe would purchase the Real Estate and the price would be based upon the number of lots approved by the Town of Chester upon Sherman's application.

25. Laroe and its principals are real estate developers with decades of experience.

26. The Sherman/Laroe Contract was part of an assembly of multiple parcels, which included not only

the Real Property, but contiguous parcels to the Real Property (the "Other Projects").

27. Subsequent to the Sherman/Laroe Contract Sherman continued to prosecute the subdivision application as provided for in the Sherman/Laroe Contract.

28. When Sherman learned of the new zoning requirements early in 2004, he was assured by the Town Planner, Garling Associates, that he could meet all its requirements "with only a modest amount of additional work" and that he would soon obtain preliminary approval.

29. Approximately five months later, sometime in late May to early June 2004 Sherman finished revising his plan.

30. However, by this time, the Town of Chester had already amended its zoning regulations.

31. Garling Associates, which helped write the new regulations, did not tell Sherman about the changes; even though it was advising Sherman about complying with the 2003 regulations.

32. These zoning amendments created several new requirements, further delaying Sherman.

33. It took Sherman approximately eleven months to once again revise the application to meet these new zoning requirements.

34. In accordance with the Sherman/Laroe Contract, Laroe participated in the development and revisions of the application.

35. However, the Town of Chester refused to entertain Sherman's application, despite holding meetings concerning another development.

36. In or about 2005, the Town amended its zoning law for a third time without informing Sherman in advance.

37. Accordingly, Sherman and Laroe revised the once application again.

38. In February 2006, the Town for the fourth time changed its zoning law without warning Sherman.

39. Sherman and Laroe responded by submitting yet another revised plan, this one in March 2007.

40. That same month, the Town changed its zoning for the fifth time, and it once again did not let Sherman know these changes were coming.

41. In November and December of 2008, Sherman and Laroe once again resubmitted the MareBrook application and Supplemental DEIS.

42. By this point, over eight years had passed since Sherman first applied for subdivision approval.

43. In January 2009, the Town Engineer gave Sherman a list of corrections to the 2008 Supplemental DEIS.

44. As part of that list, the Town Engineer demanded final designs for water and sewer plants.

45. However, Sherman and Laroe could not submit the final water and sewer designs until other aspects of the plan – like the number and location of the homes – were finalized But that, in turn, required preliminary approval, which was the very thing Sherman was trying to obtain from the Planning Board.

46. A few months later, the Town appointed a new Town Engineer.

47. The new appointee needed time to get up to speed on MareBrook.

48. The Town billed Sherman for the expense of having the new Town Engineer review the entire MareBrook project, even though Sherman already paid for the first engineer to conduct that same review.

49. The new Town Engineer had an entirely new set of questions, concerns, and items for Sherman to address.

50. Despite that, for two years the new Town Engineer maintained his predecessor's requirement regarding sewer and water plant designs.

51. In September 2009, Sherman and Laroe submitted two different versions of the subdivision proposal.

52. By now, the proposals had become much more conventional than Sherman's first application, and they did not include the recreational facilities initially envisioned.

53. Soon after submitting the proposals, Sherman discovered that the Planning Board Chairman had been replaced.

54. The new Chairman, Don Serotta ("Serotta"), was "openly hostile" towards the MareBrook application.

55. Serotta had written letters to the Town in 2001 against the project.

56. Serotta was also adverse to Laroe's Other Projects.

57. For three months, the Planning Board refused without explanation to put Sherman's proposals on the agenda.

58. In December 2009, Serotta explained that Sherman needed to pay $25,000 in consultants' fees.

59. However, Sherman did not receive an invoice for those fees, as required by the Town Code, for approximately two months.

60. Serotta had other demands for the project as well.

61. Serotta required an additional "cluster plan," which would lead to yet another reworking of Sherman's DEIS.

62. Serotta also insisted that all roads must be twenty-four feet wide- instead of thirty feet.

63. This required Sherman to redraw his plans to relocate curbs, drainage, watere and sewer mains, and grading.

64. Thereafter, Serotta canceled Sherman's appearance at the Planning Board's monthly meeting and demanded an additional $40,000 more in consultants' fees.

65. The Planning Board also insisted that Sherman respond to a questionnaire, which required Sherman to provide, among other things, an evaluation of a traffic intersection in the Town of Monroe (located miles away) and the details of a wetlands walking trail crossing which did not cross any wetlands.

66. Sherman was also required to answer all inquiries by local residents. Some answers to these questions needed to be repeated twenty to forty times because the Planning Board did not permit him to quote a previous answer.

67. In September 2010, the Planning Board voted to accept Sherman's DEIS as complete, seven years

after his original DEIS was first "deemed complete" in October 2003.

68. A few months later, Ted Fink replaced Garling Associates as the Town Planner.

69. Fink requested an additional study regarding traffic on the other side of town even though Sherman had long before completed that study.

70. Fink also sent monthly lists of demands to Sherman, which included a "wetland study," a "concerted species study," and a "constraints study."

71. The new studies concluded that there were no changes since those same studies were completed in 2003.

72. Fink also required Sherman to redo the DEIS, despite the fact that it had just been deemed complete.

73. The Town's machinations to prevent the development of MareBrook were not without cost.

74. Between taxes, interest charges, carrying costs and expenses, Sherman spent approximately $5.5 million on top of the original $2.7 million purchase price.

75. In furtherance of the project, Laroe provided $2,550.000.00 to Sherman.

76. On or about January 12, 2012, Sherman commenced this action by filing a Complaint in the Supreme Court of the State of New York – County of Orange (the "Complaint").

77. Laroe incorporates by reference and repeats and reiterates Sherman's allegations of fact in the Complaint.

78. The action was subsequently removed to the District Court by Defendants.

79. The Town of Chester's conduct with respect to the MareBrook Application and the Other Projects amounted to a pattern of repetitive or unfair land-use procedures in order to avoid making any final decision.

AS AND FOR A FIRST CAUSE OF ACTION REGULATORY TAKING OF PLAINTIFFS' REAL PROPERTY, AND DENIAL OF HIS PROPERTY INTEREST IN USING, ENJOYING AND SELLING HIS REAL PROPERTY

(U S. Constit., amends. V, XIV)[5]

80. Laroe repeats and reiterates the allegations set forth in Paragraphs 1 through 79 of the Complaint herein.

81. When Laroe entered the Sherman/Laroe Contract, it reasonably believed and reasonably expected that Sherman would be able to obtain subdivision approval for his MareBrook project.

82. The repeated zoning changes and other roadblocks that Sherman and Laroe had to endure in their land use applications constituted takings.

83. The Town of Chester's actions, and that of its representatives, have prevented Sherman and Laroe from realizing any return on their investments in MareBrook and the Other Projects.

84. Plaintiffs have been denied any and all economically viable use, enjoyment or sale of the real

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[5] The Cause of Action tracks the Cause of Action pleaded by Sherman.

property through the Town's unreasonable and unjustified regulatory actions.

85. Laroe continued to reasonably believe and expect that its investment of $2,550,000 was not money wasted.

86. Laroe became contract vendee of MareBrook and the Other Projects in order to create a reasonable residential development.

87. As a consequence of the Town of Chester's abuse of its regulatory powers, through the enactment of sequential zoning laws, and its administration of the Planning Board process through unreasonable technical requirements, wrongful financial exactions and undue and unjustified delays, the Town of Chester financially exhausted Sherman.

88. The Town of Chester's techniques and methods of land use regulation, including constant rezoning and land use enactments (which do not substantially support the Town's master plan), and the Town's arbitrary and capricious administrative requirements imposed by financially self-interested consultants, constitute irrational regulation which does not support a valid public purpose.

89. The Town of Chester's 2001 land use moratorium, and subsequent changes to the Town's zoning and land use laws, regulations and the Town's interpretations thereof, were not designed to, and did not, substantially advance legitimate State or Town interests, and lack rational basis.

90. Defendant's zoning changes, upon information and belief, run against the master plan and comprehensive plans.

91. Regulatory actions taken to prevent residential development in an area zoned for residential development, in order to maintain a a de facto nature preserve, constitute "reverse spot zoning" and, for this additional reason, are irrational governmental action.

92. The zoning actions of the Town of Chester were intentionally directed at Plaintiffs to single them out and to discriminate against their subdivision proposals.

93. The Town of Chester's actions constituted unlawful "reverse spot zoning" as they were designed to impermissibly prevent Plaintiffs' legitimate and reasonable proposed use and development of their real property.

94. Despite being required to do so, the Town failed to prepare its own EIS (generic, supplemental or otherwise) when its revised land use ordinance(s) had the potential for significantly affecting the environment.

95. The Town of Chester's actions herein have deprived Plaintiffs of all use and enjoyment of their real property, including, but not limited to, the right to develop and sell any portion of such property; thus constituting a per se regulatory taking of Plaintiffs' property.

96. The Town of Chester's actions in denying Plaintiffs of all use, enjoyment and benefit of their real property amounts to a categorical taking of Plaintiffs' real property by the Town.

97. The Town of Chester's regulatory actions taken herein, to the present, are supported by little, if any, valid public purpose, whereas the burden imposed upon Plaintiffs has been oppressive and devas-

tating; thus constituting a regulatory taking of his property without just compensation under the teachings of the US Supreme Court in Penn Central. *See, Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

98. The Town of Chester' land use law changes were not of environmental significance, as indicated by the Town's own declarations of environmental non-significance in the form of Negative Declarations ("NegDec's) under SEQRA.

99. The Town of Chester's land use law changes were used by the Town to impose oppressive regulatory burdens upon Plaintiffs, preventing them from using, developing and enjoying their property and destroying them financially.

100. In balancing the Town's legitimate interest against the legitimate interests of the property owner, both legal title and equitable title, the balance clearly indicates that the Town has taken Plaintiffs' real property.

101. By constantly and unreasonably changing its land use laws, continuing to this day, the Town of Chester has deprived Plaintiffs of all economically viable use of their land on a temporary and permanent basis.

102. Upon information and belief, the Town of Chester's actions essentially amounted to the creation of open space and visual easements for the benefit neighbors and others in the Town.

103. Upon information and belief, this amounted to a de facto invasion of Plaintiffs' property, and the taking of land, and the property interest of visual easements and easements to light and air, for the benefit of the townspeople.

104. This constitutes a *per se* taking of Plaintiffs' real property without due process or the payment of just compensation.

105. Upon information and belief, the indefinite and potentially permanent keeping of Plaintiff's lands in an undeveloped, semi-forested state, thereby allowing it to be sown with tree seeds from neighboring property, constitutes an actionable invasion of property by the action of the Town and a further actionable taking of Plaintiffs' property.

106. Upon information and belief, Defendants' governmental actions and processes created an extraordinary delay regarding Plaintiffs' right to use and subdivide the property thereby destroying the "incidents of ownership" to which Plaintiffs are entitled under the Fifth and Fourteenth Amendments of the United States Constitution, and constitute a "taking" of property without due process or just compensation.

107. Upon information and belief, by its actions the Town of Chester has perpetrated both an actual regulatory and de facto regulatory taking of Plaintiffs' property.

108. Upon information and belief, by its actions the Town of Chester has perpetrated an actual or de facto invasion of Plaintiffs' property, on the pretext of acting within the Town's police powers.

109. Upon information and belief, the Town's constant re-zonings, affecting MareBrook and the Other Projects, cumulatively created a local regulatory scheme that violated *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), namely, that "while property may be

regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

110. Moreover, under *Penn Central* and subsequent cases, the Town's actions have so frustrated distinct investment-backed expectations as to amount to a taking of property when considering factors such as:

- the economic impact on the Plaintiff of the challenged rule, regulation or statute;
- the extent to which the regulation interferes with investment-backed expectations; and
- the nature of the challenged action.

111. Through the Town of Chester's actions, it has sought to prevent Plaintiffs from exercising their vested rights, obtained by law and/or equity, to subdivide and develop the Real Property.

112. Alternatively, Defendants have, through intent or negligence, improperly delayed Plaintiffs' ability to obtain a "vested" property interest in their land use applications.

113. Upon information and belief, Defendants are liable to Plaintiffs under the " pecial facts" exception, and also as a matter of equitable estoppel.

114. Laroe has been damaged thereby.

WHEREFORE, Laroe prays that this Court grant judgment against the Defendants awarding it damages and other appropriate relief as follows:

a. An award of compensation for the taking of Laroe's interest in the subject real property,

b. Such other and further relief as to this Court seems just and proper.

Dated: Goshen, New York

August 5, 2016

/s/ Joseph J. Haspel
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